FACULTY OF LAW

UNIVERSITY OF TORONTO

and

LAW SCHOOL

DALHOUSIE UNIVERSITY

MATERIALS ON CONFLICT OF LAWS

VOLUME II

January, 1995

John Swan

Aird & Berlis
Toronto

Vaughan Black

Dalhousie University
Halifax

We are grateful for the help of many students, now too numerous to mention individually, over the past many years in the constant revisions in the organization and text of these materials.

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A NEW BEGINNING

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PART B

A NEW BEGINNING

Chapter 7

Introduction

We have now seen the operation of the traditional rules of Conflicts in a number of substantive areas of the law. We have also explored some of the problems of judicial jurisdiction and the recognition and enforcement of certain foreign judgments. As you will have noticed, the discussion of these latter topics bore almost no relation to the issues of choice of law.

The principal feature of the traditional choice of law rules is that they are "jurisdiction selecting". This phrase refers to the fact that they refer whatever question has arisen for decision to the law of a certain jurisdiction as the "governing law". In general, the determination of the governing law was made by considering certain geographical features of the case, the "connecting factor". Sometimes, a single fact was determinative of the choice of law issue, e.g., the *situs* of land or of movable property, in other cases the inquiry was more complex. The concept of the proper law of the contract referred the court not to one fact, but to several. We saw, for example, a wide variety of geographical facts referred to in *The Assunzione* (Vol. I, page 48). The rules for torts, the double-barrelled rule of *Phillips v. Eyre* (Vol. I, page 115) is, of course, highly anomalous. The only important geographical fact in the bulk of torts cases is the place where the plaintiff chooses to sue.

It is apparent from the choice of law rules of the traditional type that they offer a wide variety of decisions for the courts to make. A rule that provides that some question is to be governed by the *situs* of land offers the possibility of an objective determination of the issue. Land, after all, can only be situated in one place on the earth's surface. A rule that refers to something like the "proper law of the contract" offers some objective features in the sense that such features were listed by the Court of Appeal in *The Assunzione*, but, as formulated in *Etler v. Kertesz*, (Vol. I, page 37) suggests a subjective evaluation of the geographical factors. Which factor, or group of factors is to be given predominant weight? Much the same kind of evaluation has to be made to determine where a person is domiciled. (We will examine this particular question later in the course.)

The principal difficulty in understanding conflicts cases arises from the fact that there is no universally accepted approach to the problems presented by the courts. Here, almost more than in any area of the law, the problems of words and

concepts as prisons for judicial thought and as substitutes for analysis loom large. Only when the issues have been reduced to the most basic level of analysis that is possible will any solution be found. It is therefore necessary to set out some very fundamental propositions.

Law is a rational enterprise. This may seem to be nothing but a statement of the obvious. However it is often forgotten and its consequences are interesting and worth exploring in some detail. The first consequence is that every decision made in the context of the law must reflect the inherent demands of rationality. We would be offended if a judge were to decide a torts case by flipping a coin. We might say that to decide the case in this way would be cheaper and likely to be right in enough cases—after all, in some cases the plaintiff wins and in others the defendant does—and by flipping a coin we would create the same situation. We would reject this as an appropriate method because we would regard it as irrational to decide cases in this way. A rational disposition of tort claims may require an examination of fault, intention or of the desirable or efficient allocation of risk. If we find that any decision is one that depends on irrelevant factors then we may be concerned about how well the judge did his or her job.

There are, of course, limits on how far the process of rationality can be pushed. The achievement of a fully rational system may be frustrated by the fact that the court cannot get adequate access to the facts. Here the court may have to do the best job that it can with the information that it has, and, in examining the court's decision we may be hampered in exactly the same way. We accept this second-best result because the costs of getting the information may be too high, or, at least, too high for the parties to bear. Again there may be cases where a rational analysis leads to a logical impasse. If a court finds that both parents are equally desirous and deserving of the custody of a child, the dispute may only be resolvable by a decision that might as well be made by a flip of the coin. It says something about our belief in the need for rationality that even here a judge would not flip a coin in open court.

The second consequence is that one has to respect the demands of the judicial process if that is the way in which the problems that come up are going to be solved. The judicial process is characterized by the way in which the parties participate. The parties participate in the process under the common law by having, (a) the chance to present the facts to the court, and (b) the opportunity to present reasoned arguments. Before one can make a reasoned argument one has to know what criteria are likely to be considered by the court. At the same time one has to know what facts are required by the legal rules or principles that are or might be applicable so that the necessary facts, if they exist, can be brought before the court. There is therefore a close relation between the process of judicial decision-making and the requirement of rationality.

The third consequence is that we can talk rationally about the solutions that the law reaches for the problems it has to solve. Law must make sense; the decision must be justified by reference to non-legal criteria. Much of your time in other courses will have been spent in worrying about such justifications for the results that the courts or the legislature reached.

What is important in any analysis that we adopt is not that we are always agreed on what the correct result might be or even on the correct criteria to determine the result but that the criteria are explicitly articulated so that they can be examined and considered.

Seen against the theoretical structure, traditional conflicts theory is very unsatisfactory. There is, first, the problem of characterization. Characterization is fundamental to the operation of the traditional rules, yet there is no agreement on how it should be carried out or even over what it is. In terms of the problem presented to a lawyer when a client comes for advice, the process of characterization is, of course both fundamental and essential: the lawyer has to know where to find the law so that the client can be given advice. This process may be as basic as turning to a torts text-book rather than to a contracts one, or selecting a particular volume of the Canadian Abridgement or volume of the provincial statutes. We all know that this process works well for what can be termed the paradigm cases: cases or problems clearly fitting in one of the well--recognized categories of the law. At the border of any category there are serious problems of characterization. In the purely Canadian context, the problems of the interaction of the law of contracts and torts in regard to the measure of damages and the running of the limitation period are examples of the problems of dividing cases into separate pigeon-holes. In those cases, as you know, there is no certainty and no principled basis for any decision.

These problems arise whenever we try to project onto the facts a distinction that they cannot maintain. It is as if one were to ask, "when does a person become bald or fat?" There are, no easy answers to these questions, even though we know that whether a person is bald or fat is often very clear. If some important consequences were to depend on the answers to the questions that have just been asked, we would be concerned about the process of answering them. We might want to know why the answer was so important or what the purpose of the inquiry was. So long as nothing important turns on the characterization of a person as bald or fact, the problem of line-drawing does not arise.

Traditional conflicts theory forces us to draw lines even though we are often quite unsure why we are drawing them or why the drawing of a line might be relevant to the dispute. We saw, for example, in *Block Bros. v. Mollard*, (Vol. I, p. 192) that the result of the case depended on whether the provision of the British Columbia Act was regarded as one of substance or procedure. What has that

question got to do with the problem that the court faced? The issue was very simple: should the provisions of the Act be applied to make the contract unenforceable in the particular circumstances of the case? That question required a balancing of the value or social purpose of encouraging the licensing of real estate agents to ensure their competence against the desirability of preventing unjust enrichment. The presence of foreign facts was a set of facts to be considered like any other. To resolve the case by reference to the process of characterization is an illogical response to the question that the court faced. Similarly, as we have seen, the characterization of the issue in *Charron v. Montreal Trust* (Vol. I, p. 92) as one of contracts led the court to reach a result that was probably unfair and unjustified.

The absolute necessity for the formal process of characterization under choice of law rules of the traditional type, is the principal fact that calls the whole process into question. It is admitted by most authors, either expressly or implicitly, that the process can lead to results that are not uniform (the forum characterizes a question in one way, the (or a) foreign court would characterize the question differently) and that there is little agreement on how the process is to be conducted.

The doctrine of *renvoi* (outlined Vol. I, pp. 207, ff) is equally illogical and indefensible. We have come across renvoi as a consequence of the traditional rules (using *Bondholders v. Manville* as an illustration, Vol. I, page 208). There are two illogical consequences of this doctrine. One is the argument of Morris and Cheshire (Vol. I, p. 193) and now expressed in *Dicey & Morris*, p. 74, and Cheshire and North, p. 71, that the doctrine is of only limited application. Morris and Cheshire do not argue that renvoi is not logically entailed, only that its application in every case would be too complex. The question that remains is whether one can maintain such a position without, so to speak, throwing out the baby with the bath-water. Either the doctrine is everywhere justifiable or nowhere justifiable. One simply cannot pick and choose for no good (i.e., principled) reason. Nowhere else in the law do we accept that rules may be too complex to be applied. (The effort to make laws simpler may be a response to unnecessary complexity but is at the same time an acknowledgement that if the law were not changed the complex rules would have to be applied.)

The second problem is that at the same time as the doctrine of renvoi is logically entailed or necessary, it is equally logically insoluble. Either there is an endless oscillation or one side, so to speak, stops the rally, picks up the ball and goes home with it. Why the rally stops at any point is the great mystery. There are two theories: partial renvoi—once over the net and once back when the ball stops—or total renvoi—three times over the net when the ball stops. Partial renvoi is known as the "civilian method" and is applied by civil law systems. "Total" renvoi as described (true total renvoi would be an endless oscillation) is

also known as the "English" doctrine and is, of course, more sporting than the civilian method. The problem of renvoi is made even more awkward by the fact that uniformity of results only be achieved if both courts do NOT adopt the same rule. If both courts adopt the same rule, then, logically, no solution is possible (there is an endless rally) or different solutions will be reached. We reproduce here the quotation in Volume 1, p. 208 (*Dicey & Morris*, 11th ed. p. 88, footnotes omitted):

> *Circulus inextricabilis.*— As we have seen, the effect of applying the doctrine of total renvoi is to make the decision turn on whether the foreign court rejects the renvoi doctrine or adopts a theory of single or partial renvoi. But if the foreign court also adopts the doctrine of total renvoi, then logically no solution is possible at all unless either the English or the foreign court abandons its theory, for otherwise a perpetual *circulus inextricabilis* would be constituted. So far, this difficulty has not yet arisen, because English courts have not yet had occasion to apply their renvoi doctrine to the law of a country which adopts the same doctrine. It is perhaps unlikely that any foreign country will adopt different conflict rules from, but the same renvoi doctrine as, those prevailing in England. Consequently, this difficulty (unlike the first two which have been mentioned) is more academic than practical. Yet the possibility remains, and the *circulus inextricabilis* cannot (it is submitted) be dismissed as "a (perhaps amusing) quibble." "With all respect to what Maugham J. said in *Re Askew*," [[1930] 2 Ch. 259] said the Private International Law Committee, [First Report (1954) Cmnd. 9068, para. 23(3)] "the English judges and the foreign judges would then continue to bow to each other like the officers at Fontenoy." It is hardly an argument for the doctrine of total renvoi that it is workable only if the other country rejects it.

The claim of this part of the materials is that traditional conflicts doctrine is fundamentally incapable of faithfulness to the demands of the process of adjudication and, hence, to the requirements of justice.

This statement is a strong criticism of the traditional rules. It is based on the following argument. If the process of characterization is carried on in a result--selective way, that is, if the judge chooses the characterization to reach some result that he or she has already selected, then any possibility that the law may develop as a system of reasoned elaboration of rules is denied. If a judge reaches a conclusion in a case by characterizing an issue as, e.g., one of contract and not tort or as an issue of matrimonial law and not testamentary law, and *if no reasons are given for this conclusion*, the process of adjudication is seriously compromised. "Result-selective" characterization is incapable of being justified by reasons for the reasons cannot be articulated under the rules governing the process of characterization. There are no understood or agreed standards or principles that permit the parties to know what facts are likely to be relevant (that is, that are likely to move the judge to decide one way or another) and, simultaneously, of course, no basis to support a reasoned argument. It is not a *reasoned* argument for counsel to say, "I submit, my Lord, that my client should win." Similarly,

it is not a reasoned argument to say, "I submit, my Lord, that this is a contracts case and not a torts case", and to add in response to the question, "Why?", "Because if it is a contracts case, my clients wins".

Exactly the same criticism can be made of the doctrine of renvoi. To argue that it is too complicated to apply the doctrine in contracts is not an adequate answer to the question of the doctrine's scope, unless a reasoned justification can be found for arguing that contracts cases require simpler rules than, say, personal property security cases or marriage cases. Carried to its conclusion such an argument would suggest that contracts cases could justifiably be decided by flipping a coin. If we reject coin flipping as undercutting the demand for rational and reasoned decision making, how can we pick an arbitrary point at which to stop our investigation of the rules we have determined are relevant?

The contagion that is carried by these compromises and refusals to talk openly about what is at issue has been carried to every part of the traditional conflicts doctrine. If we can defend result-selectivity in characterization, we can defend it in determinations of the proper law of the contract. It is, therefore, regarded as permissible to choose the proper law with an eye on the result that the choice will lead to. Since the reason for the choice must be hidden—the test for the proper law refers only to the law of that jurisdiction that has the closest and most real connection with the contract—once again no reasoned argument is possible, and are counsel given no guidance on what facts might be relevant.

The following statement openly endorses result-selective characterization and the use of devices like renvoi to reach desired results. Castel, *Conflict of Laws, Cases, Notes and Materials*, 6th ed. 1987, pp. 1-35:

> Although modern conflict of laws is less rigid, more differentiated by issues and more concerned with competing values and interests, Canadian courts should not feel ashamed to use the traditional method of jurisdiction-selecting rules to solve conflict of laws cases. The centuries old process has resisted many assaults and on the whole, proved quite successful. To say that the courts choose a law without considering how that choice will affect the controversy is not accurate. The lawyer representing one side or the other in a case characterizes . . . the problem in such a way that it will, by virtue of the relevant conflict of laws rules, ultimately call for the application of a law supporting his client's contention. Obviously, he has examined the contents of the potentially applicable laws. If the court feels that it would lead to an unjust result to apply the law called for by the suggested characterization, it will reject such characterization, or use other techniques such as *renvoi*, public policy, and so on in order to apply a different law and reach a different result. As will be noted, characterization is not a purely mechanical process. If more than one characterization is available for a set of facts, the choice between the characterizations may turn upon the court's desire to achieve justice in the particular case or preference for one rule of law over another.

> Under the traditional approach the court is able to concern itself with the contents of the foreign laws among which it has to choose and of the policies behind them before selecting the one state whose law will be applied, even though the court does not frame its opinion in those terms. In practice, the courts do not proceed independently of the law's contents which are to be discovered at a later stage of the inquiry. Since in most jurisdictions the foreign law must be alleged in the pleadings, this gives the court an indication of the laws which will be relied upon by the parties.

These charges that are made against the traditional rules are serious. If they can be sustained they indicate that that theory or conceptual structure is not just wrong in point of detail (as, for example, some of the tinkering with the tort rules in *Chaplin v. Boys* might indicate) but fundamentally inadequate. At best, the traditional theory permits the achievement of the correct result in a case quite by chance; at worst, traditional theory seriously undercuts or threatens the values that any legal system must seek to forward. These charges and claims will be addressed in a moment.

One important point must first be noted. Rules of law are much more complex than they seem at first sight. It would be incorrect to state, for example, that in the common law of contracts consideration is always required for a valid contract, or that the *Statute of Frauds* really means what it says. A correct statement of the law of Ontario, British Columbia, Nova Scotia or any other province on any issue is generally very complex. You must, therefore, be aware of the dangers of treating a simple statement of some foreign law as an accurate statement of that law. There is no reason to assume (and abundant evidence to the contrary to indicate) that foreign law can be any more simply stated than our own.

This difficulty is an inescapable aspect of conflicts cases. We avoid the worst problems by focusing almost exclusively on conflicts cases that arise between jurisdictions roughly similar to our own. Even then, there is a wide range of differences between the rules (and underlying legal concepts) in conflicts. Von Mehren and Trautman, *The Law of Multistate Problems*, p. 84; say:

> Before analyzing the choice-of-law process, we need to reflect briefly on the prerequisites and possible limits to its effective functioning. Are there areas of law in which it is not possible, or at least highly impractical, for the forum to handle litigation under rules and principles different from those applicable to a fully domestic matter? If so, what are the characteristics of these areas and what implications do these characteristics have for areas in which choice of law does function?
>
> To begin with, a forum undertaking to handle a matter to which domestic rules may not apply ordinarily faces increased difficulties of two sorts: First, the forum may ultimately be required to understand and apply unfamiliar rules and principles; second, the forum in any event must consider the choice-of-law problem, and ineluctably another dimension is added to its inquiry even if the ultimate conclusion is that domestic rules and principles apply. Litigation involving significant non-domestic elements thus often presents a

> comparative-law problem and inevitably carries with it a choice-of-law problem. Each of these problems may be of considerable intellectual difficulty, and the former can also involve real dangers of misunderstanding and misapplication of the relevant nondomestic rules and principles.

It is necessary to dispose of some preliminary arguments. One claim that is made for the traditional theory is that it provides for uniform results regardless of where a case may be litigated. This claim is expressly made by Castel, *Canadian Conflict of Laws*, 2nd ed. p. 49, (quoted, Vol. I, page 225 and *infra*, page 9) and implicitly made by *Dicey & Morris* and *Cheshire & North* in their respective discussions of the functions of Conflicts analysis. The claim that conflicts rules must establish a basis for uniform decisions irrespective of where the case is litigated is a common and important feature of most of the more radical modern variations of the traditional rules. (We have seen brief references to some of these ideas in, for example, the judgments of the House of Lords in *Chaplin v. Boys*, Vol. I, page 120.) It is important to notice that, even on the traditional theories' own terms, the claim that it contributes to uniformity is not only false but illogical. It is false insofar as traditional forum centred rules like *Phillips v. Eyre* exist and to the extent that a plaintiff may be entitled to maintain a "legitimate juridical advantage" when the defendant argues that the forum is inconvenient. It is likely false in many cases where the manipulation of illogical or open-ended concepts like characterization or the proper law of the contract is permitted and from the fact that, as we shall see in Volume III of these Materials, there is not, even within Canada, any agreement on the content of the rules for determining something as important to the traditional rules as the concept of domicile. It is an illogical claim insofar as there can be no universally agreed basis for solving the problem of characterization and in that a common approach to the problems of *renvoi* (i.e., both jurisdictions accept *either* total *or* partial renvoi) precludes either jurisdiction from reaching the same result as the other.

If the claim that traditional theory contributes to or ensures uniformity of results is shown to be false by the existence fairly exotic examples of conflicts reasoning, can the theory be supported on other grounds? Morris, *The Conflict of Laws* 2nd ed. p. 9 says: "In any given case the choice of law depends ultimately on consideration of reason, convenience and utility—e.g., how will the proposed choice of law work in practice, not only in this case, but also in similar cases in which a similar choice may reasonably be made?" Castel, *Canadian Conflict of Laws*, 2nd ed., for example, in a section entitled "Methods" (pp. 29-51) lists the following objectives (pp. 47-49):

i. Co-ordination of legal systems: relevant policies of interested legal units

It is usually said that one of the objectives of the conflict of laws is to co-ordinate the incidence of the legal systems of the world and thus to further harmonious relations and co-existence among legal units. To do so, the rules of conflict of laws must take into consideration the relevant policies of these legal units. This is very important when the legal units belong to the same political unit as in the case of a federal state. The legislature and the courts of a particular legal unit must have respect for the legitimate needs and interests of other legal units and co-operate with them in furthering these needs and interests. Only in this way will the demands of interprovincial and international commerce be fulfilled. This approach does not mean that the legislature or the courts should ignore their own relevant policies, needs and interests.

In the absence of a formulated rule of conflict of laws applicable to the particular issue, the court, after appraising the relative interests of all the legal units involved in the determination of that issue, should simply apply the law of the territorial unit of dominant interest. For instance, in the case of a transfer of an interest in land, it is normal to apply the law of the territorial unit where the land is situated.

ii. Justice of the end result

The desire to do justice in cases involving legally relevant foreign elements is often advanced as the most important objective of any system of conflict of laws. Thus it is said that a legislature or court cannot do justice if it refuses to recognize the existence of foreign law or rights acquired by virtue of that law or denies validity to a foreign judgment. Also the conflict of laws rules adopted by the legislature or the courts must be the expression of the local concepts of justice as applied to problems of private international intercourse. Furthermore, in the individual case, the court must ask itself what are the demands of justice in order to achieve justice of the end result. The search for justice is a very important element in the development of a coherent system of conflict of laws in territorial units like those of Canada where principles and rules of conflicts are largely the work of the courts. This search for justice will often bring about a change in the conflicts rules as local concepts of justice vary with the passage of time. The application of the domestic law as the better rule of law is, in terms of socio-economic jurisprudential standards, another example of the search for justice.

iii. Protection of justified expectations

An objective which is closely associated with that of justice is the protection of the justified or reasonable expectations of the parties. This is an important objective in the conflict of laws but it is necessarily limited to situations where such expectations deserve satisfaction. In this connection, the nature or location of the transaction will play a significant role. For instance, in the contractual field, the parties, subject to certain limitations, are free to choose the law to govern their contract.

> Protection of the justified expectations of the parties is also achieved if the results are predictable in advance.
>
> *iv. Predictability and uniformity of results or of legal consequences*
>
> The rules of conflict of laws must be such that they will prevent the decision from depending on the fortuitous place of trial. Forum shopping must be discouraged.
>
> Predictability and uniformity of results are especially important in areas where the parties are able to give advance thought to the legal consequences of their acts. Uniformity of results is also important in the field of succession to interests in movables. Since it would be unreasonable to have each of these interests governed by a different law, the courts have adopted the rule that such succession is governed by the last domicile of the deceased. Predictability gives security to the parties.
>
> *v. Convenience, simplicity, ease in the determination and application of the law to be applied*
>
> Conflict of law rules should be simple and easy to apply; they should facilitate the judicial task. Preference for the law of the forum simplifies the judicial task. For instance, it is more convenient for a court to apply its own rules of procedure than foreign rules. Simplification of the judicial task is not the only objective of a system of conflict of laws, and opposing considerations my outweigh it.

In a more specific context, Castel says: (*Canadian Conflict of Laws*, 2nd ed. p. 524, ¶ 399.)

> In the field of contracts, the best way to develop international trade and be responsive to social commitments is to adopt conflict of laws rules that promote the doctrine of freedom of contract or party autonomy and protect the justifiable expectations of the contracting parties. In this way certainty, predictability and uniformity of results can be achieved. This means that the parties should be able, within certain limitations, to determine which law governs issues involving the validity of their contract and the nature of their obligations, so as to foretell with accuracy what will be their rights and liabilities under the contract in case of its breach.

He regards this as an adequate justification for the traditional rule. The issue can now be fairly carefully drawn: To what extent are the conflicts rules in contracts likely or appropriate to achieve "certainty, predictability and uniformity of results" and to permit the process of adjudication to function as it should?

Chapter 8

Contracts Revisited

To answer the question asked at the end of the previous section: "To what extent are the conflicts rules in contracts likely or appropriate to achieve 'certainty, predictably and uniformity of results' and to permit the process of adjudication to function as it should?" it will be useful to re-examine the contracts cases that we have already considered.

Etler v. Kertesz (Vol. I, page 37). The analysis of Porter C.J.O. suggests that the court is largely indifferent to the result on the issue of enforcement or not. No issue of contracts values appears to be at all relevant. Yet there are at least two relevant and competing policies. The first is that contained in the *Bretton Woods Agreement Act* (R.S.C. 1952, c. 19) (Now *Bretton Woods and Related Agreements Act*, R.S.C. 1985, C. B-7) (Vol. I p. 85). This legislation suggests that, at least as regards a fellow member of the International Monetary Fund, Canada is not indifferent to the outcome. There might be a dispute whether the contract in issue is an "exchange contract" or not. (There are English cases on the point: see *Sharif v. Azad*, [1967] 1 Q.B. 605; [1966] 3 All E.R. 785 (C.A.), *Wilson, Smithett & Cope, Ltd. v. Teruzzi*, [1976] Q.B. 683, [1976] 1 All E.R. 817, and *United City Merchants (Investments) Ltd. v. Royal Bank of Canada*, [1983] A.C., 168, [1982] 2 All E.R. 720, [1982] 2 W.L.R. 1039 (H.L.).) Austria became a member of the I.M.F. on August 27, 1948 after a membership resolution was passed on April 7, 1948.

Second, there is a fairly strong policy in the common law against unjust enrichment. It is, of course, true that in many cases the upholding of a plea that a contract is illegal has led to the enrichment and unjust enrichment of one side. Yet there are cases when the courts have been prepared to ensure that there is no unjust enrichment if it can be prevented. In fairness to Porter C.J.O., it should be said that the extent to which the Ontario courts responded to this concern has only been obvious for about the last twenty-five years. Though, as those cases showed, the concern was not the result of a novel or radical shift in approach and there were many more or less covert and widely accepted methods for avoiding results that looked to be startlingly unfair or unjust.

What is startling about the judgment in *Etler v. Kertesz* is that there is no mention of these policies. There is no indication that the choice of law rule operates to ensure that any contracts values whatever will be forwarded. If *both* Austria and Canada, as members of the I.M.F., share the same point of view as regards currency control why do we even consider Swiss law? Before we could conclude

that the contract should be enforced in spite of the I.M.F., what degree of connection with Swiss law would be necessary? There is, in short, nothing in the judgment to suggest that anyone participating in the case (except, of course, the parties and, especially the plaintiff) or those who approve of it as an example of the correct conflicts approach (including Castel and *Dicey & Morris*) were even aware of the contracts issue. To say, then, that such a rule as that developed by Porter C.J.O. achieves any *contracts* values is quite unjustifiable.

The Assunzione (Vol. I, p. 48). It is simply impossible to know what contracts issue was at stake here. We know nothing about either French or Italian law, and so we have no knowledge of what the precise impact of either was on the contract. To say, as the Court of Appeal did, that whatever the contract issue, it is determined by the kind of contact counting that the court indulged in, is as predictable as flipping a coin. Suppose payment had been required in French francs, English pounds or American dollars, should that fact change the result, and, if it does, why? There is simply no way in which the decision can be defended as part of the reasoned elaboration of rules. To say that the result is in accord with "business efficacy" is to make a statement that is not supported by any facts or evidence.

Vita Foods and *Ross v. McMullen* (Vol. I, pp. 67, 81). In both of these cases there is simply no conflicts issue at all. In the first, the law of no jurisdiction made the contract illegal, therefore there was no need to indulge in any choice of law process. In the second case, either the Alberta act applied or it did not. If it did, the contract was caught by it, it did not, it wasn't and there is again no conflicts issue. If the Alberta act does not apply (because on a reasoned interpretation of its scope, given the existence of geographically complex facts, it is held not to apply to these parties) it is the policy of *both* Ontario and Alberta that contracts be enforced unless there is some good reason not to. The British Columbia Court of Appeal in *Block Bros. v. Mollard* (Vol. I, page 192) concluded, in effect, that the British Columbia Act did not apply and that the contract should be enforced.

In the notes following *Ross v. McMullen* we referred to the case of *Greenshields Inc. v. Johnston*, [1981] 3 W.W.R. 313, 28 A.R. 1, 119 D.L.R. (3d) 714 (Alta. S.C.); aff'd [1982] 2 W.W.R. 97, 17 Alta. L.R. (2d) 318, 35 A.R. 487, 131 D.L.R. (3d) 234 (Alta. C.A.). where the court held, accepting the parties' express choice of law, that the proper law of a contract of guarantee was Ontario and that, since that choice had not been made to avoid the provisions of the Alberta *Guarantees Acknowledgement Act*, R.S.A. 1980, c. G-12, the guarantee was enforceable in spite of its failure to comply with Alberta law. That legislation provided:

> 3. No guarantee has any effect unless the person entering into the obligation
>
> (a) appears before a notary public,
>
> (b) acknowledges to the notary public that he executed the guarantee, and
>
> (c) in the presence of the notary public signs a statement at the foot of the certificate of the notary public in the prescribed form.

Enforcement was permitted in Alberta because the creditor had had the foresight to provide that the contract should be governed by the law of Ontario (where no such requirement existed).

Bank of Montreal v. Snoxell (1982), 143 D.L.R. (3d) 349, (Alta. Q.B.) was an action on a judgment of the British Columbia court. The action in B.C. had been brought on a guarantee given by a resident of Alberta and executed by him in Alberta. The guarantee, as in *Greenshields*, contained an express choice of law clause. In *Snoxell* the parties had chosen B.C. law. Such a judgment might have been enforced by the Alberta court in the ordinary course on the ground that a decision of the B.C. court, having proper jurisdiction over the defendant under the Alberta rules and now under *De Savoye v. Morguard Investments Ltd.*, should preclude any argument that Alberta law had been misapplied. As we have argued, no Canadian court can justifiably regard the decision of another as being contrary to its "public policy."

The Alberta court suggested that it was unconcerned about the fact that enforcement might violate some "public policy" of Alberta. MacNaughton J. stated (page 350 D.L.R.) that "[h]ad the plaintiff brought its action in Alberta, the guarantee would have been unenforceable." Apart from the inconsistency between the statement of MacNaughton J. and the judgment of the Alberta courts in *Greenshields* (which was applied) one question raised by the *Snoxell* facts is whether the B.C. court should have enforced the guarantee.

In both cases, the case in Alberta and the case in B.C., we can point out that either the Alberta statute had some rational purpose which, we may assume, should not be avoided by standard "boiler-plate" drafting or it did not. If it did, the creditor should not be able to avoid its application by an appropriately drafted choice of law clause; if the statute had no rational purpose, why should the statute ever be applied?

The Alberta legislation has given rise to some very odd cases. See Vaughan Black, "The Strange Cases of Alberta's *Guarantees Acknowledgement Act*: A Study in Choice-of-Law Method" (1987), 11 *Dalhousie Law Journal* 208.

Lehndorff Property Management Ltd. v. McGrath, [1984] 3 W.W.R. 187, (B.C.S.C.), illustrates the obvious danger in drafting a choice of law clause without making sure that the parties comply with that law. The parties chose to have a guarantee governed by the law of Alberta. The plaintiffs action in B.C. was dismissed on the ground that, by choosing Alberta law, the guarantee was caught by the Alberta legislation. This result is consistent with *Greenshields* to the extent that the choice of law clause was given effect in both cases. What both cases permit the parties to do (and, given the nature of the plaintiffs, a broker and a bank, you know very well which party expressed the "choice") to express their willingness to accept a rule when that matter was not one over which they had any control. We are again left wondering about the contracts values expressed (however confusing the message might be) in the many cases on exemption clauses and on the attitude to standard form contracts used by banks and other businesses in their dealings with consumers.

The question raised in *Ross v. McMullen*, is the possibility that the presence of geographically complex facts may make the decision whether a statute applies or not at least not obvious. What is clear from *Ross v. McMullen*, *Greenshields*, *Snoxell* and *Lehndorff* are the impediments to clear thinking thrown up by the conflicts process. Note as well the incentive that these decisions give to forum shopping. In contrast, *Gillespie Management Corp. v. Terrace Properties* (Vol. I, page 84) illustrates a much more satisfactory approach.

The possibility of an approach based on the interpretation of the foreign legislation was offered in a recent Ontario case, *243930 Alberta Limited v. Wickham* (1990), 75 O.R. (2d) 289, 73 D.L.R. (4th) 474, (C.A.). (A brief case comment on this case is: Swan, "Interprovincial MURBS, Conflicts and Rationality" (1991), 4 *National Real Property Law Rev.* 9.) The defendant, a resident of Ontario, invested in MURBS (a tax-driven form of investment) in Alberta. The form of the investment was the assumption by the defendant of a mortgage given to the plaintiff by Francis Broadfoot. The mortgage went into default. The plaintiff sued on the personal covenant in the mortgage and sought summary judgment. The defendant argued that he was protected by the *Law of Property Act*, R.S.A. 1980, c. L-8, s. 41, which provided:

> (1) In an action brought on a mortgage of land, whether legal or equitable, or on an agreement for the sale of land, the right of the mortgagee or vendor is restricted to the land to which the mortgage or agreement relates and to foreclosure of the mortgage or cancellation of the agreement for sale, as the case may be, and no action lies
>
> (a) on a covenant for payment contained in the mortgage or agreement for sale;
>
> . . .

> (5) Any waiver or release hereafter given of the rights, benefits of or protection given by subsections (1) and (2) is against public policy and void.

The plaintiff argued that the defendant had waived the protection of the Act. The judge gave summary judgment for the plaintiff and the defendant appealed.

The principal argument of the plaintiff was that the provisions of s. 41 were procedural and, as such, were only applicable in an action brought in Alberta. McKinlay J.A., with whom Blair J.A. concurred, stated: (p. 297, O.R., p. 481, D.L.R.)

> The main issue in the appeals is whether the law of Alberta or the law of Ontario applies to the agreements entered into between the parties. . . .

The questions raised by this statement of the issue included: what was the proper law of the contract? did the Alberta Act "by its wording" apply to the facts? was the section substantive or procedural? what was the effect of the waiver? McKinlay J.A. held in favour of the defendant on each of these questions. Lacourcière J.A. agreed with McKinlay J.A. but gave his own reasons for regarding the section as substantive.

What was the issue in this case? The plaintiff argued that the defendant was not protected by an Alberta statute which, *prima facie*, at least, appeared to govern the dispute. The defendant argued that the Act applied. The conflicts issues raised by the case are indicated by the questions listed in the preceding paragraph. The *contracts* issue in the case can be stated in a number of ways. One way is to ask, "What is the purpose of the Alberta statute and was it meant to apply to these facts?" The circumstance that might take the case out of the "too-simple-for-argument" category was that the defendant was a resident of Ontario, both when he made the investment and when he was sued. The land was in Alberta, but, given that the statute only applied to individual mortgagors (as opposed to corporate mortgagors), it might have been inferred that the purpose of the Act was not so much directed at Alberta land as at individuals who were Alberta resident mortgagors. Thus re-phrased, the question before the Ontario Court of Appeal was whether an idiosyncratic provision of Alberta law—idiosyncratic only in the context of the general rules for the enforcement of personal covenants in mortgages—should be applied to deny *this* plaintiff a remedy against *this* defendant, particularly when the effect of the Alberta law would be to cut down the application of a principle shared by both Alberta and Ontario, *viz.*, that a party should normally be held to the promises that he or she has made.

Alternative arguments suggesting that the act might justifiably be applied would emphasize the fact that the mortgagee knowingly lent money on the security of Alberta land and may fairly be held to bear the consequences of that risk. The rate charged on Alberta mortgages to individuals might be higher than the rate

charged on Ontario mortgages since the Alberta mortgagee assumes the risk of being unable to sue for any deficiency. If the mortgagor has "bought" the right to have the land go to satisfy the mortgage so that he is free of his personal covenant, perhaps that risk should not be upset because the mortgagor is from Ontario.

It follows from the way that we have stated the issue that the Court of Appeal may have reached the correct conclusion. If it did, however, it was by chance for the Court never addressed the issues that were relevant. Had the contracts issues that we have mentioned been addressed, uniformity could be achieved because an Alberta court could reasonably agree with the Ontario court that the Alberta statute did not apply, or on the alternative argument, both could agree that the Alberta circumstances suggested that the parties could be held to have bargained over the risks that each ran in making the deal. In other words, a focus on what can be called the contracts or even the statutory interpretation points in the case would permit each court to reach the same sensible and defensible decision.

These cases are exactly analogous to *Bondholders v. Manville* (Vol. I, page 89). The problem in *Bondholders v. Manville* was one of capacity to contract. As a result of the decision a contract was held to be unenforceable. Is this decision sensible? The general, centuries-old tendency of the law of contracts towards the increasing enforcement of promises can be seen as a consistent pressure in such cases as *Slade's Case* in 1602, in the attempts to get around the *Statute of Frauds*, in more recent cases in such areas as promissory estoppel, *High Trees* (*Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] 1 K.B. 130), in negligent misstatement, *Hedley Byrne* (*Hedley Byrne & Co.Ltd. v. Heller and Partner Ltd.*, [1964] A.C. 465), in the treatment of warranties in the sale of goods, in illegal contracts, and, of course, in changes in the law like the abolition of incapacities such as those affecting married women. We may, therefore, have some doubts about the wisdom of refusing to enforce a contract such as the one Mrs. Manville signed. Of course, there was Florida legislation that apparently made the contracts of married women unenforceable. The question then becomes one of deciding the scope of the Florida legislation. Legislation, like everything else in the law, must have a rational purpose. Assuming that the purpose of the Florida legislation was to forward some Florida purpose (though assumptions about purposes of laws, particularly foreign laws, admittedly may be the subject of some dispute), it is hard to see why the legislators of Florida would have any concern for married women other than Florida married women. After all, why should they care if a Saskatchewan married woman should agree to buy Florida land and pay an inflated price for it? (More recent concerns for foreign ownership of land would, of course, present quite a different problem.) It seems hard, therefore, to imagine that the application of the Florida legislation in *Bondholders v. Manville* forwarded the purposes of that legislation. If this

analysis is correct, there was no rational purpose to be served by not holding Mrs. Manville to her promise. A promise was refused enforcement for no good reason.

The *Bondholders* case is sometimes referred to as a "false conflict". By this is meant that, on examination, it appears that there is no need to choose between the possibly competing rules because both, properly interpreted, come to the same result. We will examine in some detail later just what is meant by a "false conflict", but, for the moment, accept the term as one referring to a case like *Bondholders*, analyzed as has been suggested. Morris in his student text, *The Conflict of Laws*, 3rd ed. (1984) p. 288, specifically refers to this case as a "false conflict" and later discusses the general nature of the cases in this category (pp. 526, ff). Castel, *Canadian Conflict of Laws* 2nd ed. (pp. 36, ff), admits the existence of such a general category of cases. Castel does not, in this edition, specifically mention *Bondholders* but he suggests that *McLean v. Pettigrew* is such a case (p. 36).

This admission is fatal to the whole edifice that these authors (and those who have built on them) have created. The structure for conflicts analysis that we examined in Vol. I (Fig. 1, page 28) does not permit the court even to look at the content of any of the applicable laws until, first, the process of characterization has been completed and, second, the applicable choice of law rule has been formulated and applied. We can only know that something is a "false conflict" by examining the *rules* that are in conflict. Only if we consider the Florida rule and its purposes regarding married women can we know that the Florida courts might well see no reason not to enforce the contract. But a focus on the rules in conflict is precisely what the traditional theory cannot permit. As Morris (*op. cit.*) notes that *Bondholders* is a false conflict, he refers to it (page 367, note 14) as "the clearest case" for the rule that "capacity to incur liability to a bill is governed by the *lex loci contractus*." How can a case be authority for a rule the that he admits makes no sense in its application? Or, conversely, if the application of a rule leads to an absurd result, how can the rule be supported?

The concept of the proper law forces us to find a *governing* law—the law of the jurisdiction with which the contract has its closest and most real connection. How can one criticize the application of this approach in *Bondholders* and approve the same approach in *The Assunzione*? It may, of course, happen that the witness called to prove Florida law could testify that that law did not make the contract invalid. (Castel, in an earlier edition of his work, suggested that renvoi might be used if Florida governed questions of contractual capacity by the *lex domicilii*.) But the evidence, on the traditional analysis, could only be considered *after* the choice had been made, and Florida held to be the "governing" jurisdiction. Castel, Morris and *Dicey & Morris* cannot have things both ways. The traditional rule cannot be supported when we are completely

ignorant of how a particular foreign rule might be interpreted by the foreign court and the choice of law rule phrased in terms *only* of the geographical contracts of the contracts to the various relevant jurisdictions (See, e.g. *Dicey & Morris*, Rule 180, Vol. I, p. 64) at the same time as the notion of "false conflicts" is put forward as an alternative approach. We shall return to this issue later; its resolution is essential to any workable theory of conflicts.

Charron v. Montreal Trust (Vol. I, p. 92). This case illustrates a very much more complex problem. Once again *Dicey & Morris* (p. 783) approves of this case and regards it as an important authority in support of the proper law test. This view is taken because the case, involving a separation agreement, is nevertheless resolved by reference to ordinary commercial cases. Such an attitude illustrates almost better than anything else the poverty of the traditional approach. Properly understood, *Charron* presents not a contracts problem but a problem that we can call one of maintaining the integrity of legal systems. We shall return to this problem frequently in these materials and *Charron* is as good an example as any case of it.

Each legal system in the world—certainly each legal system in what is called the "Western World"—has to deal with essentially the same problems: contracts, torts, marriage, succession, property, bankruptcy, etc. Each deals with these problems in ways that reflect the peculiar features of its culture, traditions and legal system. Each may well use different concepts and legal categories to resolve the problems that come up. *Charron* provides a good illustration of the methods for protecting a dependant wife on the death of her husband. The common law method for protecting wives in cases of separation and on the death of their husbands had two principal features. (Ignore for the moment recent legislation like the *Family Law Act*, R.S.O. 1990, c. F.3, in Ontario. It is irrelevant to the argument.) The first is that the parties have the right to make a separation agreement that will be enforced in much the same way as any contract. The wife could sue for arrears and claim as a creditor on the husband's death. On the death of her husband, however, she might, subject to the *Succession Law Reform Act*, R.S.O. 1990 c. S.26, the *Wills Variation Act*, R.S.B.C. 1979, c. 435 in British Columbia, or the *Family Maintenance Act*, R.S.N.S. 1989, c. 160, in Nova Scotia, have no claim to any part of his estate. He was, at common law, free to dispose of his estate in any way he chose, and might, if he wanted, leave her destitute. In Québec, on the other hand, as the evidence in *Charron* makes clear, and at the date of that case, separation agreements were not enforceable unless they were approved by a court. However, Québec offered spouses a regime of community of property under which a wife was, by virtue of her marriage, entitled to a share in her husband's estate on his death. The parties were unable to alter the matrimonial property regime by contract during the marriage; they could choose a different system to govern their financial relations only if they made an antenuptial agreement. It

makes some sense in such a system to treat separation agreements with some scepticism and subject to strict controls for the enforcement of a separation agreement could upset the underlying matrimonial property regime.

If we look at *Charron* in this light then we have the possibility (we do not have enough facts to know if it is more than a possibility) that the wife's claim involves the stacking of incompatible claims. She is probably entitled under Québec law to the wife's share of her husband's estate. (The rule for the application of Québec law to a marriage is basically that the domicile of the husband at the date of the marriage is determinative. Morden J.A., is, in any case, prepared to assume that the parties were domiciled in Québec at all times. This rule has its own problems that we will examine later.) The effect of the decision is to give the wife the arrears under the separation agreement *in addition* to her share of the community property. She could not have got both amounts under Québec law for the very good reason that she was entitled to part of his estate regardless of whatever he may have provided by his will (and, of course, without any of the risks that are involved in an application under the *Succession Law Reform Act*). Her claim to a fixed share is regarded as being her fair share of his estate. To give her any more would unfairly prejudice some other beneficiary or possibly the children of the marriage.

Of course, the facts that are assumed in this analysis may not be true in this particular case. But some support for this version is provided by the fact that the wife sued in Ontario. She would have done so only because it was believed that she would not win in a Québec court—so much for the argument that traditional conflicts rules achieve uniformity! However, even if the assumptions that have been made are not correct, the reasoning of the court completely ignores the possibility that there is the problem of the mixing of incompatible regimes. To regard the agreement in this case as the same as a commercial agreement is absurd. To talk about the proper law of the contract in this case is to direct the inquiry into areas that are unhelpful and that only mis-state the problems. The concept of the proper law as a device for sorting out the problem has once again prevented the court from focusing on the real issue.

Charron also emphasizes the importance of characterization. The problems that the case raises are in part caused by the fact that the court sees the issue as one of contracts. Once the issue is seen in this way then, under traditional conflicts doctrine, the proper law test is applied. Had the court put this case into the heading of, for example, matrimonial rights or succession, then there would have been no inclination to talk about the proper law, because the choice of law rules for those categories of cases are quite different. As we have said, any lawyer who has to handle a legal problem must classify the problem in some way before she can deal with it. This process becomes elevated into a fundamentally important (and separate) part of conflicts because so much depends on it. If it is

crucial to the disposition of a case that it is put into the "Contracts" slot and not into the "Succession" slot, then we have to worry much more about the process than is usual. Had the facts of *Charron* been regarded as raising an issue of succession then the governing law would have been Québec because the relevant choice of law rule is that matters of succession are, in general, governed by the deceased's domicile at the date of his death. (You can see how this characterization of the issue could operate in bizarre ways if, for example, a couple married in Ontario and the husband died domiciled in Québec. We shall look at one such case in Vol. III.)

The structure of the traditional rules does not force the court to deal with the real issue: it can hide behind a facade of words that are, in essence, as meaningless to the dispute as divination by the examination of chicken entrails would be. (Notice that this role for the court is not one that it has chosen in the face of criticism: it is a role consistently favoured by the authors who support the traditional rules.) In any legal analysis the reasoning process must force the court to articulate precisely what it is doing and why. The reason for what it does *must* respond to the need to show that identifiable social policies are forwarded. It almost goes without saying that the result of *Charron* in the Québec courts would be different. Notice as well that because the executor was a corporation doing business in both Québec and Ontario, the plaintiff could get personal service on it in Ontario. If courts are going to apply traditional rules, the case might be better dealt with as a jurisdictional issue. In other words, the less capable choice of law rules are of responding the demands of the law, the less scope we can give them and, correspondingly, the more scope we must give to controls over the place where the plaintiff can sue.

Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. (Vol. I, p. 58) This case is an excellent example of the traditional rules in the hands of an able court. It may be that the result is satisfactory on the question of which court should hear the case, but the process of deciding that question cannot avoid all the problems of the traditional approach. The competence of the court merely masks the fundamental defects in the traditional theory. As a test for the taking of jurisdiction, the proper law test may have more to recommend it than it has as a choice of law rule. Notice, however, that the test cannot ensure that the twin issues of fairness and provincial (or international) sovereignty are adequately dealt with.

All these cases (except *Amin Rasheed* and, possibly, *The Assunzione* about which we know almost nothing) are cases where the issue was whether the contract in question was valid and enforceable or not. There are, of course other contract issues. Underlying the cases when the parties have made an express choice of law are important issues of interpretation. One more of the odd features of conflicts analysis is that a choice of law clause is somehow treated as special in

the context of interpretation. There is no basis for such special treatment, except possibly the need to be especially vigilant that one party not be caught by unfair surprise by the other slipping in an unexpected choice of law clause. As an issue of the interpretation of the contract the notion of the proper law may be important as suggesting the background against which the parties may have contracted. In this sense, the determination of the proper law does not indicate a "governing law", only the legal background to the agreement for *those issues from which such a background is relevant*. These issues are those that would normally be ones that the parties can control by their agreement. The facts of *Ross v. McMullen*, for example, present no such issue: the application of the Alberta legislation is independent of the parties' intentions or expectations. Similarly, the parties cannot (or should not be able to) determine for themselves whether the contracts in *Charron* or *Etler v. Kertesz* should be enforceable or not.

There are, however, some things that they can determine for themselves. Such a situation might be presented by the facts of *Imperial Life v. Colmenares* (Vol I, p. 96). This case is quite different from any that we have examined so far. No one is arguing that the contract was illegal or unenforceable *when made*. The question before the court is which party shall bear the risk of supervening illegality by Cuban law. This question can be seen as an issue of frustration or supervening impossibility. The determination of the proper law may have been justifiable if it had been the basis for the conclusion that the contract was made against the background of Ontario law, so that the question of the risk run in the circumstances might be determined from the Ontario perspective. What the analysis discloses is that the conclusion that the proper law is Ontario is only half of the inquiry. It has then to be decided if, *under Ontario law*, illegality by Cuban law provides an excuse. Cuban law, on this analysis, becomes relevant regardless of the choice of law process. The judgment of Ritchie J. must therefore be regarded as dealing with only part of the problem.

The opposite conclusion, i.e., that the proper law was Cuban, would equally not have been an adequate *contracts* analysis: it would not, for example, have met the standards that Castel sets out for satisfactory conflicts contracts doctrine. Focusing simply on the geographical connection of the contract to Ontario and Cuba when the contract was made, and, in particular on such things as the place of acceptance of the risk, says nothing about the appropriateness *in contract terms* of the decision to put the risk of loss on the insured rather than on the insurer. Remember that the parties could have chosen, had they bargained over the matter, which of them would bear the risk of supervening illegality.

It is useful to compare the analysis of the Supreme Court of Canada in *Imperial Life v. Colmenares* with a similar American case. In *Vishipco Line v. Chase Manhattan Bank* (1981), 660 F. 2d 854 (2nd Circuit, Court of Appeals) an action was brought by a number of Vietnamese corporations to recover amounts on

deposit in the Saigon branch of the defendant bank that were lost when the bank closed down shortly before the fall (or, perhaps, depending on your point of view, the liberation) of Saigon on April 30, 1975. In delivering the judgment of the court, Mansfield J., dealt with the argument that the bank was discharged by the circumstances existing in Vietnam at the time that the bank closed down. He said (pp. 863, 864):

> Chase next argues that under Vietnamese law its failure to repay plaintiffs' deposits in the period prior to May 1, 1975, was not a breach of its deposit contract, because the conditions prevailing in Saigon at the time rendered payment impossible. In support of this argument, Chase cites various sections of the South Vietnamese Civil Code which excuse performance under various extenuating circumstances, as well as the provisions included in the deposit contracts used by the Saigon branch which purported to discharge the bank's responsibility for losses to depositors resulting from a variety of unexpected and uncontrollable sources.
>
> This argument must be rejected for the reasons that impossibility of performance in Vietnam did not relieve Chase of its obligation to perform elsewhere. By operating in Saigon through a branch rather than through a separate corporate entity, Chase accepted the risk that it would be liable elsewhere for obligations incurred by its branch. . . . U.S. banks by operating abroad through branches rather than through subsidiaries, reassure foreign depositors that their deposits will be safer with them than they would be with a locally incorporated bank. . . . Indeed, the national policy in South Vietnam, where foreign banks were permitted to operate only through branches, was to enable those depositing in foreign branches to gain more protection than they would have received had their money been deposited in locally incorporated subsidiaries of foreign banks. Chase's defenses of impossibility and *force majeure* might have been successful if the Saigon branch had been locally incorporated or (more problematically) if the deposit contract had included an explicit waiver on the part of the depositor of any right to proceed against the home office. But absent such circumstances the Saigon branch's admitted inability to perform did not relieve Chase of liability on its debts in Saigon, since the conditions in Saigon were no bar to performance in New York or at other points outside Vietnam. Nor has Chase shown that that the Vietnamese government took steps to assume or cancel its branch liabilities. The May 1st decree nationalizing the Vietnamese banking industry only provided that "[a]ll . . . banks . . . will be confiscated and from now on managed by the revolutionary administration"

There were also a large number of Cuban life insurance policies litigated in the U.S. There was no uniform approach, but the general tendency was for the courts to recognize the effectiveness of the Cuban exchange control law so long as Cuba remained a member of the I.M.F. When Cuba left the I.M.F., the general tendency was for Cuban law to be ignored and results similar to that in *Imperial Life v. Colmenares* were reached. Cuba left the I.M.F. on 2nd April 1964, right in the middle of the Canadian litigation. No reference to the *Bretton Woods Agreement Act* was made by any Canadian court.

As the result in *Imperial Life v. Colmenares* makes clear, it is not true that the traditional rules always reach the wrong result and we do not claim that this occurs. Our criticism is that the correct result occurs largely as a matter of chance and quite without reference to any *contract values*. It should not need to be said that it is this feature which shows why traditional analysis is quite incapable of achieving the values Castel sets for it. The whole structure of the rules makes those values absolutely irrelevant. Subsequent developments in the life insurance cases bear this out.

As we mentioned earlier, a result opposite to that in *Colmenares* was reached in *Arnoldson v. Confederation Life Association* (1974), 3 O.R. (2d) 721, 46 D.L.R. (3d) 641 (C.A.) because the policy provided that "All payments . . . shall be made in the City of Havana, Republic of Cuba". As we have also mentioned, there is a large and important contracts issue here.

Compare *Colmenares* and *Vishipco v. Chase Manhattan* from the point of view of the likelihood of either decision resulting in fairness and predictively useful rules. *Colmenares* and *Arnoldson* fasten on to things that must be irrelevant to the real issue. Would the insured in *Arnoldson* have understood the significance of the added clause in the contract of insurance? Notice that Mansfield J. in *Vishipco* refers specifically to there being a problem if the bank had tried to rely on the contract of deposit. Why do the courts completely ignore the normal *contracts* approach to contracts, see, e.g. *Tilden Rent-A-Car v. Clendenning* (1978), 18 O.R. (2d) 601; 83 D.L.R. (3d) 400 (C.A.) and *McClelland & Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6, 125 D.L.R. (3d) 257, and of course, the many cases on *contra proferentem*, fundamental breach and good faith. In *Vishipco*, on the other hand, the analysis of the court focuses on such things as the risk assumed by a U.S. bank that goes into a foreign country to do business and to obtain funds from local residents who rely on the bank's U.S. connections. Such an argument could surely have been made in *Colmenares* and just as powerfully in *Arnoldson*. If it had been, then we might have had a sounder basis for considering what effect, if any, should have been given to the special clause in *Arnoldson*.

What is both so odd and so frustrating about traditional conflicts analysis is that no note is taken in *Arnoldson* about the extraordinary number of cases on exemption clauses. The effect of the clause in *Arnoldson* is *exactly the same* as the effect of an exemption clause: it allocates a risk to one side, that, were it not for the clause, would be on the other (by virtue of the decision in *Colmenares*). There are judicial statements without number on the proper view that a court should take to an exemption clause. *Arnoldson* makes it clear that, regardless of what writers like Castel and *Dicey & Morris* say, traditional choice of law theory acknowledges none of the concerns of the law of contracts.

The absurd lengths to which a conflicts analysis can be taken is demonstrated by the plaintiff's arguments in *Kutziner et al. v. The Allstate Insurance Company of Canada*, [1982] I.L.R. 1-1472 (Ont. Co. Ct.). The plaintiff attempted to use conflict of law rules in order to claim no-fault death benefits which were not available under the law of New Brunswick. The deceased had entered into an insurance contract in New Brunswick, where he and the plaintiff resided, through an agent of the defendant. After the death of the insured, the plaintiff argued that since the premiums were sent to the defendant's office in Ontario, and the defendant company had reserved the right to reject any application, the contract had been completed in Ontario. Submitting that Ontario was the proper law of the contract, the plaintiff sought to recover a $5,000 no-fault death benefit available under Ontario law but not under New Brunswick law. In response to the court's finding that the contract was completed in New Brunswick, the plaintiff submitted that, on the basis of *Imperial Life Assurance Company v. Colmenares*, the place of making of the contract was not determinative of the proper law. The court rejected these submissions, finding that, unlike *Colmenares*, the decision to "go on the risk" had been made in New Brunswick. Since the contract was connected only with New Brunswick law, the court held that this was the proper law of the contract, and dismissed the plaintiff's claim for benefits under Ontario law.

What has the proper law of the contract of insurance got to do with the availability of statutory no-fault benefits?

Ralli Bros. v. Compania Naviera (Vol. I, p. 100). This case should be compared with *Colmenares*. In *Ralli* the only question is whether the defendant is excused by the events that had happened. Reference is made, not to abstract ideas of conflicts, but to domestic English cases on frustration: e.g., *Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] A.C. 119. The message that *Ralli* gives is scrambled because a choice of law rule is deduced from it, *viz.*, that a contract illegal by the law of the place of performance will not be enforced. Even when the courts use contracts ideas to resolve cases with geographically complex facts, the academics have to re-state the courts' decision in conflicts terms. The result is, of course, that the courts are encouraged to do what they did in *Colmenares* and *Arnoldson*.

We would be far better off if we had never invented the topic of conflicts: there are adequate contracts tools at hand to deal with all the cases we have so far examined.

This last comment is crucially important. The analysis of the cases that has just been made has, we hope, illustrated our claim that whatever values one has for the law and for a legal system, they not only may not be forwarded by the application of conflicts rules, but are likely to be frustrated by them. It is

necessary to see the cases as *contracts* cases, as cases where we are concerned with contracts values, the ordinary processes of contract interpretation and construction and ways that, in a contracts setting, provide a basis for allocating the risks of loss necessarily inherent in the relation.

The consequences of this argument are far-reaching. For the moment we want to emphasize one aspect that is, from the students' point of view, very important. It is possible to deal with a conflicts problem in a law school exam or as an articled student in a law firm by asking the questions that we have seen the courts ask and then answering them. The question that you must now consider is whether that approach will be useful.

The following question might be given as an assignment or on an exam.

> You are an articled student at a law firm. You are part of the team acting for the purchaser, Briggs Inc., in a share purchase deal. Your client proposes to purchase all the shares of a closely held corporation, Talbot Inc. The shares are all owned by Grace Talbot who started Talbot Inc. about twenty years ago and developed it into a very successful business selling data processing services across Canada and in several states in the United States. Your client plans to employ Ms. Talbot as President of the corporation after the purchase for a minimum five year term. As part of the deal, an employment contract between Talbot Inc. and Ms. Talbot is being negotiated. Ms. Talbot's experience and contacts are vital to the business and, should she leave the corporation, her ability to compete with it would have very serious adverse consequences for the purchaser's investment.
>
> You have been asked to prepare a memo outlining the issues that should be dealt with in the employment agreement regarding choice of law and jurisdiction. Your preliminary research has indicated that the Ontario common law on agreements in restraint of trade imposes significantly more limits on what conduct of the vendor or employee can be controlled by a non-competition clause than is the case in, for example, Québec where Talbot Inc. does a considerable amount of business. In comparison, the American states where the corporation does business are sometimes even more restrictive (i.e., they may limit more severely the purchaser's rights to enforce a non-competition clause) than the Ontario common law.
>
> Draft the required memo and include your recommendations for the general nature of the clauses that you think should go in the

agreement regarding the issues you have been asked to deal with. Explain what the effect of the clauses you have recommended is likely to be.

A superficially attractive way to deal with this problem is to suggest that the parties choose the law of Québec—after all that law is the most "generous" to non-competition clauses—and make an exclusive attornment to the courts of that province. A more careful analysis of the problem would disclose the following points:

(a) A non-competition clause, a clause that prevents a vendor or employee from competing with the purchaser or employer, involves a covenant in restraint of trade. At common law, a covenant in restraint of trade is contrary to public policy and void unless it can be shown to be reasonable. The plaintiff has to prove that the limitation on the employee's rights to compete must be reasonable. The standard of what is reasonable will be set by the court. (The fact that Canadian courts treat a non-competition clause given by a vendor more "sympathetically" than one given by a person who is an employee is irrelevant here.)

(b) If the parties are not free to determine the geographical and temporal scope of the restriction *as a matter of their "freedom of contract"* they cannot be allowed, consistently with the common law rule just stated, the same freedom simply by choosing to have the contract "governed" by another legal system.

(c) A choice of Québec law should not permit the purchaser to assert restrictions against the employee that exceed what Ontario law regards as reasonable. *Vita Foods* would support this result if the express choice can be regarded as neither "bona fide" nor "legal", or if it is "contrary to public policy." We cannot have any idea what the limits in *Vita Foods* might be—its language is, to say the least, open-ended—unless we keep the contracts issues clearly in mind. If we do that, *Vita Foods* has not advanced either the argument or our understanding of the issues, has it?

(d) Would making the courts of the province of Québec the chosen forum help the purchaser? Here again, we have to consider the substantive aspects of the law. The principal remedy sought to restrain unlawful competition is an injunction, particularly an interim injunction. As you know, an injunction is only effective within the jurisdiction of the court that made the order: it cannot

be enforced outside the province or under *De Savoye v. Morguard Investments Ltd.*

(e) The purchaser will then have to bring its action wherever the employee is competing in breach of the non-competition clause. That fact preludes the exclusive choice of Québec courts, and if they are not the exclusive courts and if an action has to be brought in either Ontario or in an American state, we are back where we started.

(f) The end result is that the purchaser will have to be advised that no choice of law clause or choice of forum clause will do anything for enhance or expand the enforceability of the non-competition clause. Such a clause will have to the justified under the domestic law of whatever place enforcement is sought. It may well be that any attempt at justification may make relevant the fact that the employment agreement had foreign facts, but if so, that result is an application of the contracts (or competition) rules of the *lex fori*.

(g) This conclusion may not obviate the need to identify the background legal system against which the contract was drafted for issues of interpretation and risk allocation over which the parties have almost complete control may still arise. Since the law firm handling the deal is in Ontario and since it is likely that its members are only entitled to practise law there, it would not only be sensible but essential that this background be identified as Ontario. (How can an Ontario lawyer ever defend him- or herself against an accusation of professional negligence in choosing the law of another place to govern a contract if the client gets a nasty surprise as a result of the choice?)

(h) The radical argument that a choice of law clause is unnecessary should, however, be considered. We know that most Canadian lawyers regard a choice of law clause as a necessary part of any contract. If such a clause has (or should have) no more effect than has been argued for, its role (assuming that the contract has been carefully drafted) is non-existent for there will be nothing that will change whatever the background legal system might be. The professional liability issue raised by omitting a choice of law clause is quite different from that raised by the express choice of a foreign law.

The point of this illustration is to demonstrate that a multi-jurisdictional problem that involves a contract and a non-competition clause can only be dealt with if you keep the particular contracts rules constantly in mind. The peremptory nature of the limits on the parties' contractual freedom makes it clear that the parties cannot, by any expression of their agreement, make the only rules to govern their relation. The necessary method of enforcement forces the plaintiff to consider the need to sue wherever the competition occurs so that whatever planning may be achievable through a choice of forum clause is not available in this situation. If the problem were a franchise agreement or a long-term supply contract, the issues would be different and the scope for the chosen law might be wider.

One further point needs to be noted, though it will become the principal focus of an extensive analysis later. There is no justification for the belief that the achievement of uniformity in the results of cases brought in two different jurisdictions will be compromised just because each court looks at the problem from its own point of view. Two provinces may well disagree on the issue of enforcement in a particular case: one province may believe that, in the particular circumstances of the case, the value of holding the parties to their bargain outweighs the value of protecting some narrower or different interest. It is, however, impossible to believe that the choice of law process will ensure uniformity. What is even more important is to note that uniformity is not a value that should necessarily be forwarded. If we can permit provinces to differ on the values that each accepts—and what else is legislation but an expression of those values?—why should we assume that in a case that, *ex hypothesi* involves the law of both provinces, a uniform solution is preferable to the possibility that the courts of the two provinces, acting responsibly and with restraint, might reach different conclusions? Such differences are inherent in a federal system and, *a fortiori*, between the component states of the international community.

Chapter 9

Where Do We Go From Here?

The need to develop a more useful approach to conflicts arises in every area of the law. Marriage and divorce, torts, etc., all have special problems that arise from the peculiar domestic features of those areas of the law. If the criticisms of the traditional approach to conflicts are valid in contracts they are equally valid in any other area of the law. It must be emphasized that it is *not* the argument of this part that certainty, predictability and uniformity are either irrelevant or unimportant. These goals are of primary importance. Our task now is to see how they can best be achieved, and, in certain cases, how these values may have to be ranked if the achievement of one can only be made at the expense of another. One of the most important lessons to be learned from conflicts cases is that the achievement of these values is a difficult and complex task. Success will only be gained if we are very careful about a large number of important issues.

First, the notion of certainty in the law is a very complex idea. Certainty in contracts is not the same as certainty in torts or in property. Sometimes we need certainty to plan our affairs, at other times we need certainty in making a settlement only after something has gone wrong. The verbal formulation of propositions that achieve certainty in these two respects can differ as much as the Rule in *Shelley's Case* (1580), 1 Co. Rep. 93b, and the principle in *Donoghue v. Stevenson*, [1932] A.C. 562. It is naive to think that certainty comes from black-letter rules: it may, but equally, it may not.

In a similar manner, it can be shown that the notions of predictability and uniformity are also very complex. Uniformity presumably involves the similar treatment of similar cases. However, to know which cases are similar is only to know the whole of the law. Crude ideas of similarity are as dangerous as crude ideas of certainty. Those who use the verbal formula that the law should seek to achieve certainty, predictability and uniformity often believe that simply making that statement justifies any form of legal reasoning or analysis.

The second aspect to this argument is that discussions of this kind ultimately come down to a difference in legal philosophy. Everyone who thinks about the law and how to resolve a concrete problem that might come before a judge must eventually face the question of what the law's response should be to issues like the scope of judicial discretion and the relevance of social values. Traditional Anglo-Canadian conflicts doctrine has adopted one set of answers to these issues. There are other approaches that adopt radically different approaches. It is not suggested that one approach is wholly right or that one is completely wrong. One approach may, however, be better able to achieve certain values than the other.

The question of which one should be adopted may be a matter of what one wants to achieve. What is suggested as being defective in the traditional approach to the choice of law problem is that it is an approach that seeks, and can seek to achieve only the values of historical continuity and simplification of the judicial task. Historical continuity is, at best, a dubious value for the law to seek, and simplification of the judicial task cannot be other than a minor value.

The tragedy of the choice that is made by those who advocate the traditional rules is that it is an unconscious choice. It is necessary to spell out explicitly the reasons for the choice, the alternatives to it and the consequences of the choice that is made. The tragedy is compounded when the traditional analysis of conflicts is offered, and those who support such an approach assume that some very important social values will be achieved without indicating what those values are or how they might be achieved.

If the traditional rules are inadequate, where do we go from here? First, we must be specific about what is objectionable about the rules we now have. Some objections have already been made: can these be usefully generalized? The principal objection to the traditional rules is that they force us to make a choice between jurisdictions, between the law of Austria or the law of Switzerland, between the law of Ontario or Cuba. When we choose in this way we not only are required to ignore the content of the individual rules by the form or structure of the traditional rules, we run the serious risk that we will actually believe that we can do so. We may believe that we can peek at the content and then make a "result-selective" choice. It is true that the expert witness called to prove the foreign law may say that, for example, an invalidating rule may not apply to the contract we are concerned with. It is the failure to approach the cases as *contracts* cases that is the ultimate source of our problems. The courts do not, and are not encouraged by the rules to look at the basic contracts issues or the purposes of the law of contracts. When we look below the surface what is significant about the law of contracts is the existence of a common underlying set of values in the law of every developed western society. We can see these shared values if we say that generally the courts approach a contracts problem by asking if there is any good reason not to enforce a contract. (Of course, the accuracy of this statement may be compromised by a large number of reported cases on consideration, the rules of offer and acceptance, exemption clauses and illegality, a large number of which cannot be easily reconciled with each other, but those cases are pathological: they do not, and cannot represent main-stream contracts problems in the commercial area.) Any reasoning process that suggests we are indifferent to whether we enforce or refuse to enforce a contract is automatically suspect.

One response to this kind of concern has been to say that we apply that system of law that will *validate* the contract. Porter C.J.O. in *Etler v. Kertesz* refers to

an argument that, as between two laws, one of which would make the contract valid and one of which would make it invalid, the court should choose the law that would validate the contract (Vol. I, p. 43). Castel states: (*Canadian Conflict of Laws*, 2nd ed. p. 524, ¶ 399)

> Where there is no express choice [of the law to govern the contract], the courts should not disappoint the parties by applying a system of law that would strike down the contract unless the interest of the forum or of the state or province whose system of law is most substantially connected with the transaction outweighs the interest of the parties. The extent of the interest of a state or province in having its invalidating rule apply must depend upon the purpose to be achieved by its domestic rule and whether it should be applied to the particular transaction and the parties involved.

Once again, the concession made in the interests of apparent contracts values is, first, a fatal concession if one wants to maintain the traditional rule, and second, a naive response to the contracts issues. It is a fatal concession because it suggests that choices of law rules are purpose oriented. They cannot be so long as they are phrased like the traditional contracts rule which focuses *only* on the geographical contacts of the contract to the jurisdictions involved. The issue can be fudged by saying that, of course, the parties "intended" to have a valid contract, but this is simply a meaningless thing to say. What the parties intended, expected or wanted is, as we have seen, irrelevant in cases like *Etler v. Kertesz* or *Ross v. McMullen*. To say that they intended a valid contract in *Imperial Life v. Colmenares* or *Arnoldson v. Confederation Life* invites the response, "So what? They got one." The only area of contract in Canadian law where we can give effect to the existence of a pressure to hold people to their bargains is in cases of indefiniteness and some of the potentially irrational problems with consideration—areas like the problem of the variation of contracts, the problem of "going-transaction adjustments", promissory estoppel and the third party beneficiary rule. The principle has no operation in interpretation (except insofar as we give effect to what the parties expected), frustration or unconscionability (except in the sense that existence of unfairness may be a reason to deny enforcement).

We have to remember that no legal system enforces all contracts, so we cannot avoid focusing on why the jurisdiction that does invalidate did what it did. Thus, if we applied the *lex validatis* (everything has a latin tag in Conflicts) in *Ross v. McMullen* would that be any more sensible? The answer must be no. Both Ontario and Alberta have nearly identical legislation on real estate agents and both make the contracts of unlicensed agents unenforceable. Why then should we validate the contract? There is a good reason that we should not enforce: the social policy of discouraging unlicensed agents from preying on the public. (I leave out of consideration the argument that non-enforcement of promises may be uncalled for in the general context of controlling unqualified practitioners of

various kinds. See, *Monticchio v. Torcema Construction Ltd.* (1979), 26 O.R. (2d) 305.)

It should also be noted that the confidence one might have in the obviousness of the correct result in *Ross v. McMullen* is lessened by cases like *Block Bros. Realty Ltd. v. Mollard* and *Greenshields Inc. v. Johnston* (*supra*, p. 12). In both of those cases the courts, even though they were the courts of the jurisdiction that had the invalidating rule, got hopelessly bogged down in the traditional choice of law process and forgot what they were supposed to be doing in the first place. These cases, if we try to give them a sensible justification, can be seen as merely cases where the court saw no strong value in striking down the contracts even though they might have come under the legislation. On this basis these cases are authority against *Etler v. Kertesz* and *Bondholders v. Manville*.)

In the Anglo-Canadian tradition there has been very little concern expressed over the choice of law rule in contracts. Its very open-endedness and vagueness is often regarded as part of its strength and virtue. This attitude is fundamentally opposed to any concern that we should develop a principled approach—an approach that is committed to the need to develop predictively useful rules. *Any* result can be reached in any case where the court uses choice of law rules of the proper law of the contract type, and no one can be certain in advance what result will be reached.

We can start our examination of alternative ways of dealing with conflicts problems by looking at the development of choice of law rules in American law.

Chapter 10

American Law

The American tradition in conflicts started from a different point than the English. The American Law Institute published in 1934 the *Restatement, Conflict of Laws*. The rules of the Conflict of Laws were "re-stated" there in ways that were every bit as conceptual as the rules now applied by the English and Canadian courts. The principal choice of law rule in contracts was that a contract was governed by the law of the place where it was made. (This rule is the same as the rule adopted in *Bondholders v. Manville*.) The place where a contract is made is the place where the acceptance is final and is determined by the rules of offer and acceptance. Thus, in the context of the postal acceptance rule (*Household Insurance v. Grant* (1879), 4 Ex. Div. 216) the contract is made when and where the acceptance is mailed. Under the oral acceptance rule (contracts made by voice, telephone, telex and, perhaps, fax) the contract is made when and where the acceptance is received (heard) by the offeror. A contract is therefore made where the acceptance is mailed or where the offeror is, depending on which rule applies.

The whole Restatement project in regard to conflicts led to a number of articles that expressed fundamental disagreement with the basis on which the Restatement had proceeded. One of the first of these articles was by Cavers: "A Critique of the Choice of Law Problem" (1933), 47 Harv. L.R. 173. (Parts of this article are reproduced later in this volume of these materials.) Other criticisms were made by Brainerd Currie in a series of articles, that were subsequently collected in book-form: Currie: *Selected Essays on the Conflict of Laws*, 1963. Currie's most influential article on contracts appeared in 1958, "Married Women's Contracts: A Study in Conflict of Law's Method" (1958), 25 *U. Chic. L. Rev.* 227. Currie's purpose was to reveal inadequacies in the conceptual approach of the Restatement. The kind of analysis used to criticize *Ross v. McMullen* is very similar to that used by Currie. Other writers made many of the same criticisms. Partly in response to these criticisms and partly in response to judicial unhappiness with the Restatement, the American Law Institute began redrafting all of the Restatement. The *Restatement, Second, Conflict of Laws* was published in 1971. The contracts provisions of the Restatement are now as follows:

Restatement, Second, Conflict of Laws. Contracts:

> **§ 186 Applicable Law**
>
> Issues in contract are determined by the law chosen by the parties in accordance with the rule of § 187 and otherwise by the law selected in accordance with the rule of § 188.
>
> **§ 187 Law of the State Chosen by the Parties**
>
> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice; or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

§ 188 Law Governing in Absence of Effective Choice by the Parties

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

§ 6 Choice of Law Principles

1. A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

2. When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

(a) the needs of the interstate and international systems;

(b) the relevant policies of the forum;

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;

(d) the protection of justified expectations;

(e) the basic policies underlying the particular field of law;

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

This formulation of conflicts rules is based on many of the same premises that underlay the traditional American and Anglo-Canadian rules:

(a) uniformity is desirable; the application of the rules will make the result of any case independent of the place where the action is brought for the same rules are to be applied by all (American[1]) courts;

(b) the ordinary processes of judicial elaboration of the law will ensure that courts follow precedent in the normal way;

(c) the focus of the court's analysis is not on the jurisdictions whose law might be applied but on the competing rules applicable to each contracts issue raised in the dispute;

(d) the factors listed in § 6 are "factored out" of all the various choice of law rules and become common factors for consideration by the court in any conflicts case.

The following is an example of a choice of law principle expressing the idea that the court should validate a contract if it can. Again, it accepts that uniformity is a desirable goal. To what extent does this principle do more than suggest a starting place for reasoning about the problem?

> A contract is valid if valid under the domestic law of any state having a contact with the parties or with the transaction sufficient to make that state's validating policies relevant, unless some other state would advance its own policies by invalidating the contract and one or more of the following factors suggest that the conflict between the domestic laws of the two states should be resolved in favor of invalidity:

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[1]A strong argument was made by a number of American scholars, principally Albert Ehrenzweig, when the Restatement was being debated that it should be confined to inter-state conflicts and should not be extended to international conflicts. This view was not adopted by the American Law Institute and the formal goals or assumptions of the Restatement we have outlined are formally applicable in international conflicts.

(1) The invalidating rule reflects a viable, current trend in the law of contracts such as the growing concern for protection of the party in the inferior bargaining position;

(2) The invalidating rule differs in basic policy, rather than minor detail, from the validating rule;

(3) The parties should have foreseen the substantial interest that the state with the invalidating rule would have in controlling the outcome;

(4) The context of the contract is noncommercial;

(5) The courts of the state with the validating rules have, in similar interstate cases, deferred to the policies underlying the foreign invalidating rule.

Weintraub, *Commentary on the Conflict of Laws*, p. 292.

The following case surveys much of the modern American approach to conflicts that was current when the judgment was written. The American approach has not substantially changed since then. How well do you think that these methods resolve the problems of this case?

Lilienthal v. Kaufman
(1964), 395 P 2d 543
(Oregon Supreme Court)

DENECKE J.: This is an action to collect two promissory notes. The defense is that the defendant maker has previously been declared a spendthrift by an Oregon court and placed under a guardianship and that the guardian has declared the obligations void. The plaintiff's counter is that the notes were executed and delivered in California, that the law of California does not recognize the disability of a spendthrift, and that the Oregon court is bound to apply the law of the place of the making of the contract. The trial court rejected plaintiff's argument and held for the defendant.

This same defendant spendthrift was the prevailing party in our recent decision in *Olshen v. Kaufman*, 235 Or. 423, 385 P. 2d 161 (1963). In that case the spendthrift and the plaintiff, an Oregon resident, had gone into a joint venture to purchase binoculars for resale. For this purpose plaintiff had advanced moneys to the spendthrift. The spendthrift had repaid plaintiff by his personal check for the amount advanced and for plaintiff's share of the profits of such venture. The check had not been paid because the spendthrift had had insufficient funds in his account. The action was for the unpaid balance of the check.

The evidence in that case showed that the plaintiff had been unaware that Kaufman was under a spendthrift guardianship. The guardian testified that he knew Kaufman was engaging in some business and had bank accounts and that he had admonished him to cease these practices; but he could not control the spendthrift.

The statute applicable in that case and in this one is O.R.S. 126.335:

than that of the forum. These relationships created interests deserving of protection.

In the case before use, I believe that the policy of both states, Oregon and California, in favor of enforcing contracts, has been lost sight of in favor of a questionable policy in Oregon which gives special privileges to the rare spendthrift for whom a guardian has been appointed.

The majority view in the case at bar strikes me as a step backward toward the balkanization of the law of contracts. *Olshen v. Kaufman*, held that there was a policy in this state to help keep spendthrifts out of the almshouse. I can see nothing however, in Oregon's policy toward spendthrifts that warrants its extension to permit the taking of captives from other states down the road to insolvency.

I would enforce the contract.

SLOAN J. joins in this dissent.

NOTES AND QUESTIONS

1. The language and the approach adopted by the Oregon Court suggests that it has very different concerns from that of the Canadian and English judgments that we have read. Whether or not we agree with the result is, from an analytical point of view, less important than is the fact that we can debate the issues and discuss the relative strengths of the policies of California and Oregon. Had this case come up for decision in Canada, the court would, of course, have reached the same result as either the majority or the dissent by making an appropriate finding of what the proper law of the contract was. Such an analysis quite simply could not lead to the development of predictively useful rules. "Counting contacts" or determining which law "has the closest and most real connection" with the transaction is both formally and practically unconcerned with the result that the application of either rule would achieve.

2. It is clear from the dissenting judgment that a California court would have a good reason for reaching a different result. It is in this way that *Lilienthal v. Kaufman* is a very much more difficult case than, say, *Bondholders v. Manville*. That case was, as we saw, regarded as a "false conflict". That meant that there was no need to choose between Saskatchewan law and Florida law because both would (or should) reach the same result—*viz.*, the enforcement of the contract.

NOTE ON TERMINOLOGY – "FALSE" AND "TRUE" CONFLICTS

There are a number of ways of phrasing what is referred to as a "false conflict", and it is important to be precise what we mean. One way is to say that the

purpose of both rules would be served by a single result. Thus, again using the *Bondholders v. Manville* facts, both Saskatchewan and Florida share the same value of holding people to the bargains that they have made. Florida subordinates this value to a special one in favour of married women, but, on the assumption that this policy refers only to Florida married women, it is inapplicable on the facts of this case. (We have to ignore the existence of reasons based on the possible unfairness of the contract for not enforcing it.)

Another way of describing a "false conflict" is to say that a Florida court faced with this geographically complex case would not apply its invalidating rule. We might be indifferent to the reasons that a Florida court might do so, but the effect of such evidence of what a Florida court might do would be to remove any possible reason from the Saskatchewan court to invalidate. This result follows because in contracts we enforce unless there is some good reason not to.

The difference in these two formulations is that in the first we are focusing on the fact that a particular result forwards certain purposes and that these purposes are shared by both jurisdictions concerned. In the second formulation, we might be tempted to indulge in such exotic forms of reasoning as *renvoi* and in, for example, the context of *Bondholders v. Manville*, to regard the Florida court's reference, say, to the law of the domicile as a *renvoi* to Saskatchewan. This method is not satisfactory unless, as is difficult, we can believe that a jurisdiction-selecting rule of the type now being attributed to Florida law expresses a social policy of any kind.

The importance of these issues can be seen in *Lilienthal v. Kaufman*. This case is a "true conflict" because the purpose of both rules would be served by their application to the case. The purpose of the Oregon law is to protect the family of the person who would spend whatever should be kept for the family's support and to prevent the family's becoming a public charge. California, we may assume, is indifferent to the fate of the Oregon family (and would, like an Ontario court, be equally indifferent to the fate of a similarly situated California family), but cares very much that contracts be generally enforced. If these are the purposes of the different laws then we can rationally defend either result.

Notice that the judgment of the dissent does not deny the purpose of the Oregon law: it only says that, in a geographically complex case, the purpose is not so strong as to justify its application to limit the general and shared value in enforcing contracts. On this basis the case becomes a "false conflict". The Oregon purpose is to be subordinated to another. Neither judgment in the Oregon Supreme Court is unconcerned about the need to balance the competing values: neither is playing around with jurisdiction-selecting rules.

A true conflict of the *Lilienthal* type is regarded by many conflicts scholars as the ultimate test of any theory and the Gordian Knot that must, somehow be untangled. Underlying most of the responses, including those of the Restatement, is the idea that the presence of a true conflict will lead to different results depending on where the case is litigated. This kind of result is frequently denounced as leading to *forum-shopping* and is therefore said to be a "bad thing", and one to be discouraged. The simple faith of Restatement, Second is that both courts will agree on the result reached by the kind of analysis envisaged by §§ 6, 188. Similarly Weintraub would, presumably, support the dissent, as the Oregon rule would not meet the test set out in his first proviso.

A more ambitious attempt to resolve true conflicts—no one has any problem with false conflicts—is offered by Cavers, *The Choice of Law Process*, 1965. He offers what he terms "Principles of Preference". The ones applicable to contracts cases are the following:

> [1] Where, for the purpose of providing protection from the adverse consequences of incompetence, heedlessness, ignorance, or unequal bargaining power, the law of a State has imposed restrictions on the power to contract or to convey or encumber property, its protective provisions should be applied against a party to the restricted transaction where (a) the person protected has a home in the State (if the law's purpose were to protect the person) and (b) the affected transaction or protected property interest were centred there or, (c) if it were not, this was due to facts that were fortuitous or had been manipulated to evade the protective law. Page 181.
>
> [2] If the express (or reasonably inferable) intention of the parties to a transaction involving two or more states is that the law of a particular state which is reasonably related to the transaction should be applied to it, the law of that state should be applied if it allows the transaction to be carried out, even though neither party has a home in the state and the transaction is not centred there. However, this principle does not apply if the transaction runs counter to any protective law that the preceding Principle would render applicable or if the transaction includes a conveyance of land and the mode of conveyance or the interests created run counter to applicable mandatory rules of the *situs* of the land. This Principle does not govern the legal effect of the transaction on third parties with independent interest. Page 194.

It is worth summarizing at this point some of the features of these alternative approaches. At the same time we can examine how well they respond to the problems that have to be faced.

We need an approach to conflicts problems that permits us to choose sensibly between the competing rules. Once we reject the jurisdiction-selecting approach of the Canadian and English cases we find that there are two features that

distinguish the newer approaches. The first is that of the Restatement, Second. Here the combined effect of §§ 6 and 188 is a list of factors that the court must consider in any contracts case. There is a superficial similarity to the approach of the English Court of Appeal in *The Assunzione*, (Vol. I p. 48). However the crucial difference lies in the fact that under the approach of the Restatement it would not be possible not to know what the issue was. The Restatement approach does not, therefore, identify a "governing law": it refers to an "issue in contract". However, the Restatement does not indicate what approach should govern any particular issue. The Restatement does not suggest that, for example, the issue of validity does not present the same issues as frustration or damages.

In contrast, the approaches of Cavers and Weintraub start from the position that there must be some good reason not to enforce a contract. But, as we have seen, a focus on validity cannot solve all the issues that can come up. In fairness to both Cavers and Weintraub, they do not suggest that their approach does offer any direct answer to those other problems. They are sympathetic to the solution of that problem by means that reflect the underlying contractual concerns. What is important to understand in all the American approaches is that the authors are trying to find a solution that will be acceptable to *both* jurisdictions involved. In other words, they want to find a principle that both the Oregon court and a California court can accept. This purpose to conflicts laws is what, ultimately, makes it a separate area of the law.

Almost every American writer who has discussed the contracts aspects of conflicts has taken the position that the approach of the first Restatement is impossible. They all agree that some different approach must be found. Unfortunately they do not all agree on what should be done. We shall explore the significance of the disagreements later. As a practical matter, the general approach of all courts (Canadian, American, and English) to *contracts* is sufficiently uniform and sufficiently based on the fairly clearly perceived principle that bargains should be enforced absent good reason to the contrary, that there will be a high incidence of agreement on the resolution of contractual disputes involving geographically complex facts. The real tragedy of our continued adherence to the traditional approach is that this fact is obscured. Conflicts issues in contracts cases are, often, relatively simple; much more difficult problems occur once we move into other areas of law.

Note however that the existence of a common policy of upholding bargains will not always provide an easy solution, though recognition of that policy is a most useful starting point in analyzing choice of law problems in the contracts area. W.L.M. Reese, the Reporter for the Restatement, Second, in "Choice of Law in Torts and Contracts and Directions for the Future" (1977), 16 *Col. J. of Transnational L.* 1, discusses situations in which the basic policy is overridden

by the law of one interested state yet adhered to by the law of another. He states the basic problem as follows: (at pp. 26, 33)

> When the issue is one of validity, there will be a natural tendency for the court to seek to apply the law of a state that will uphold the contract. By so doing, the court will be furthering the basic policy of contract law which is to protect the expectations of the parties. On the other hand, all states have rules that invalidate contracts under certain circumstances, frequently for the purpose of protecting the weak against the strong. A major difficulty is in identifying those situations where the policy favouring protection of the expectations of the parties should be outweighed by the interest of a state with an invalidating rule in having this rule applied.

If we pause for a moment to consider the problems of uniformity more carefully, the problems can be transformed. Is uniformity really desirable or necessary? The international legal order and every federal system have to accommodate the right of states and, in the Canadian context, provinces, to make value judgments appropriate for themselves. Diversity is a fact in the world and in federal states like Canada. The purpose of a federal system is, after all, to permit each constituent part to make its own decisions on matters within its jurisdiction. Suppose that the *Lilienthal* facts arose in the Canadian context between Ontario and Québec. We can assume that Québec is equivalent to Oregon in having the rule that would cut down the enforcement of contracts. Suppose also that a similar case (Québec defendant, Ontario plaintiff) comes before an Ontario court. The Ontario court rejects the conclusion of the Québec court and enforces the contract. (We can ignore for the moment any problem of collecting the amount of the judgment). Assume also that the case culminates in the Québec courts with a judgment roughly along the lines of that of the majority in *Lilienthal* (closely balanced case, but ultimately must support legislative policy of forum) in the Québec Court of Appeal. At the same time the similar case in Ontario culminates in a judgment of the Ontario Court of Appeal roughly along the lines of the dissent in *Lilienthal* (closely balanced case, but the general policy of upholding contracts should prevail).

Both of these cases are appealed to the Supreme Court of Canada. What options does that court have? It has two choices, it can dismiss both appeals, or it can allow one. If it dismisses both it could say something like this:

> We believe that these cases raise matters that are only of concern to each province. These matters, moreover, fall into that class of matters that are within the exclusive jurisdiction of the provinces. We see no reason why we should review the decision of either Court of Appeal to impose a single standard for the handling of

> such problems as these cases present. Both courts have behaved responsibly in the context of the Canadian federal system in treating carefully and sympathetically the legislation and social policy of the other and nothing more can be expected of them. Neither court made any unreasonable assertion of jurisdiction so as to prejudice unfairly the resident of the other province.

Alternatively, it could say something like this:

> We think that uniformity, particularly as regards the enforcement of contracts, is a goal to be sought in Canada and that so far as possible this court should encourage it. Since, *ex hypothesi* both of these cases involve more than the interests of one province, it falls to this court to make the determination of that value that can be regarded as a transcendent national value. Accordingly, in our opinion we choose to apply the value represented by the law of . . . .

Is there a third alternative? If not, then we are forced to conclude, either that uniformity is not particularly important and diversity is one of the consequences of a federal system, or that uniformity will be obtained by the development of national values, the development, in other words, of a federal "common law". In either of these situations, the solution is reached by the application of what can only be regarded as constitutional values. Uniformity as such is either irrelevant because, from a constitutional point of view, diversity is acceptable, or imposed by the decision of the Supreme Court that one provincial value is better than another (or possibly, that both are to be subordinated to some "federal" value). This analysis seems to transform the traditional conflicts problem and inquiry.

Writing on the constitutional problem of uniformity and diversity is very sparse. The following are the principal sources:

> Willis, "Securing Uniformity of Law in a Federal System - Canada" (1944), 5 *U.T. Law J.* 352.
>
> Abel, "The Role of the Supreme Court on Private Law Cases" (1965), 4 *Alta. L. Rev.* 39.
>
> Russell, "The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform" (1968), 6 *Osgoode Hall L.J.* 1.
>
> Hertz, "*Interprovincial*, The Constitution and The Conflict of Laws." (1976), 26 *U.T. Law J.* 84.

Hertz, "The Constitution and the Conflict of Laws: Approaches in Canadian and American Law." (1977), 27 *U.T. Law J.* 1.

The American solution to this problem, which we shall examine in more detail later, is characterized by the fact that the United States Supreme Court cannot review State court determinations of State law. That court, unlike the Canadian Supreme Court, has no power to impose uniformity, all it can do is to force each court to behave responsibly. We shall investigate later what behaviour is or is not responsible.

We shall, however, make a short digression into the law of Agency to explore some problems that will add to our analytical vocabulary.

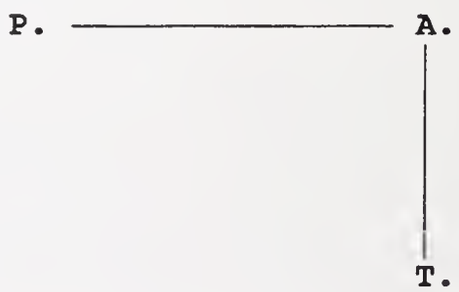
Chapter 11

Agency

The purpose of our examination of the issues and cases in this section is to review the process of resolving conflicts problems by the traditional methods and to develop some of the alternatives that we have been discussing. The problems of the law of Agency are particularly well suited for this purpose because they are simultaneously simply stated but very difficult to resolve. The principal reason for this fact is that Agency problems involve more than the two parties to a contract: they are problems of three persons, very often of the type where one of the two litigating parties must suffer for the misdeeds of a third person. This feature of the law of Agency provided a useful bridge between the problem of contracts (which are usually fairly straightforward) and the problems of torts (which are much more difficult).

The problems of agency in the conflict of laws are not often discussed. However, the cases and problems are interesting because the principles of agency are only partly determined by contract. Keep these other principles in mind as you read the cases. The general agency relation looks like this:

Table 1



P is the Principal, **A** is the Agent and **T** is the Third Party. The lines that we have drawn are slightly misleading as the line joining P and A could connote a contractual relation, while that between A and T can only indicate that they may have dealt with each other: they are almost certainly not in a contractual relation. The contract made by A is one made between P and T.

In both the common law and the civil law systems, if the agency relationship is disclosed and the identity of the principal is known to the third party, T may not assert rights of set-off or defences as between himself and the agent in a suit brought by P against T. For example, if a salesperson, A, acting as agent for a department store, P, sells a refrigerator to T, P may sue T for the price of refrigerator. In this situation, T clearly knew of the existence of the agency relationship, and knew the identity of P. Thus if A personally owed T $100, T

would not be allowed to reduce P's recovery by that amount. The rationale for this rule would seem to lie in the sense that T was fully aware of the fact that he was dealing with P, albeit through A. Obligations owed to T by A personally could not then reasonably be considered by T as appropriate to reduce his liability to P. The less clear A's representative status is, the more likely are there to be disputes between T and P.

The common law and the civil law systems also agree that if T does not know that an agency relationship between P and A exists, T is entitled to treat A as a P. That is, when sued by P, T can assert as against P any rights of set-off or defences that he would have had as against A were he being sued by A. To elaborate, we are now discussing the situation of an agent who, acting in his own name, sells goods to T without disclosing the fact that an agency relationship exists (i.e. that A is transacting on behalf of another.) If T does not fulfil his part of the contract of sale of such goods, he may be sued by P. In this situation, any rights of set-off or defences which T would have had against A had he been sued directly by A will be available to T as defendant in the suit by P. Clearly this rule operates in T's favour, probably because of the sense that it would be unfair to increase T's liability because of an agency relationship of which he was unaware.

The common law and the civil law, however, differ where the fact that an agency relationship exists is disclosed (i.e. T knows A is an agent for someone) but the identity of P is not disclosed. In this situation the common law protects Ps, by requiring T to treat A as an agent. He cannot assert rights of set-off as between himself and A in a suit by P against T. The civil law, on the other hand, protects Ts. T can assert a right of set-off stemming from a transaction solely between himself and A as long as he did not know, at the time of the transaction on which P's suit is based, the identity of P.

The theory of the common law is that once T knows that he is dealing with an agent, he assumes the risk of full liability to P in regard to the transaction which A is conducting with T on behalf of P. T does not enter the transaction with the expectation that any obligations owing to him by A will mitigate his obligations to P. The theory of the civil law is that if P chooses to hide his identity, he assumes the risk of having his recovery reduced because of collateral dealings between A and T. The civil law, then, favours Ts, while the common law favours Ps. On this point, neither rule is capricious; both make sense within their separate legal contexts. Neither embodies absolute and perfect justice. Both are workable and sensible rules, providing a background against which As, Ps and Ts can order their affairs, and accept or decline risks.

The next case raises the problem of the agency relationship where the identities of all the parties have not been fully disclosed. Bearing in mind the possible

reasons for the rules in each legal system, how well does the judgment deal with the different reasons for different results under each legal system?

Maspons Y Hermano v. Mildred
(1882), 9 Q.B.D.530.
(C.A., Jessel M.R., Lindley and Bowen L. JJ.)

[The plaintiffs, Maspons, carried on business in Havana, Cuba. The defendants, Mildred, carried on business in London. The plaintiffs employed Demestre, of Havana, as their agents to ship goods for them and to sell them on their account. the defendants knew Demestre and had extensive dealings with them. The defendants did not know the plaintiffs and had no dealings with them, though they knew that Demestre acted for principals. The plaintiffs made arrangements for Demestre to forward to the defendants for sale a quantity of tobacco. The defendants took out insurance on the cargo. The ship on which the goods were being carried sank and the underwriters paid the money to the defendants. Demestre went into bankruptcy shortly afterwards. Demestre, as a result of other dealings owed the defendants more than the proceeds of the insurance. But the proceeds of the insurance were claimed by the plaintiffs as the owner of the goods. The defendants claimed to be able to keep the proceeds to satisfy the debt owed to them by Demestre. The following provisions of the commercial law of Spain were put in as evidence and accepted by the court.]

> **Agents Sect. II.**
>
> **Art. 118.** The agent, although he may deal on account of another, can act in his own name. Consequently he is under no obligation to state who is the person on whose account he contracts, as if the business were his own.
>
> **Art. 119.** When the agent acts in his own name the principal has no right of action against the persons with whom the former has contracted in the business which he (the principal) entrusted him with, unless there be first a transfer made in his favour by the said agent. Neither is any right of action required against the principal by those dealing with his agent for obligations which the latter has contracted.

The judgment of the court was delivered by

LINDLEY L.J.:— After stating the facts as set forth above, his Lordship proceeded as follows: The questions at issue between the parties reduce themselves to two, *viz.*, first, Can the plaintiffs sue the defendants at all? Secondly, if they can, are the defendants entitled to the set-off they rely on? With respect to the first question the defendants contend that they are accountable to Demestre & Co. alone; that there is no privity of contract between the plaintiffs and the defendants, and that the plaintiffs have no right to sue, unless it be in the name of Demestre & Co. In support of this contention reliance was placed on the Spanish law prevailing at Havana. . . . The Spanish Code, by ss. 118 and 119, as explained by the witness Girado, of the Spanish Bar, authorizes an agent to act in his own name, relieves him from all obligation

interesado and that the insurance was for his benefit. It has also been shewn that the provisional insurance made by the defendants before they had this notice cannot avail them so as to put them in a better position than the policies themselves. It follows, therefore, that the lien or set-off contended for cannot be maintained.

The rule which allows a person who deals with an agent not known to be such to set off against his principal any debt due from the agent to the person so dealing with him, is well settled . . . but it is equally well settled that this rule does not apply where the person dealing with the agent knows him to have a principal, although the name of the principal may not be disclosed. Whether the undisclosed principal carries on business in this country, . . . or abroad, . . . is immaterial. If in this case the goods had not been lost, but had been sold by the defendants, and they had paid Demestre & Co. before the plaintiffs revoked their authority to receive payment, such payment would have discharged the defendants, for the plaintiffs clearly authorized Demestre & Co. to receive payment. But it is equally clear that the plaintiffs did not authorize Demestre & Co. to apply the proceeds of the plaintiffs' goods in paying a debt of their own. Having regard to the authority conferred on Demestre & Co., the defendants could not have asserted, as against the plaintiffs, a lien on the goods or their proceeds for the general balance due from Demestre & Co.. . . .

Looking at the case broadly, there is some inconvenience, not to say injustice, whichever way this case is decided. On the one hand, it is not right to pay one man's debts out of another man's money, which is what the defendants are seeking to do. On the other hand, it is not right to avail one's-self of another man's credit and connection, and not comply with the conditions on which that credit and connection rest, and this is what the plaintiffs are seeking to do. The plaintiffs, however, never led the defendants to believe that the goods were Demestre & Co.'s, for, although the bills of lading were in their name, the letter which accompanied the bills of lading informed the defendants that the goods were not Demestre & Co.'s, and were to be insured for the *interesado*. For the reasons above given, the plaintiffs appear to us to be entitled to recover £11,000, subject to the deductions which they themselves concede ought to be made.

[The judgment of the Court of Appeal was affirmed by the House of Lords, (1883) 8 App. Cas. 874, on grounds that did not involve the issue discussed by the Court of Appeal.]

NOTES AND QUESTIONS

1. The dispute here is between P and T. A is bankrupt and the issue then is which must bear the loss which A's insolvency has caused. On which party does Spanish law put the risk of A's insolvency? On which party does English law put this risk? What do the answers to these questions say about the way in which this case should be decided? What do you think should happen if there were a Spanish third party and an English principal?

2. It might be considered that the above analysis (*viz.* that the rules involved are meant to protect only people located in a particular geographic place) begs the question of the purpose of the rules. Moreover, one might question whether the idea that losses should not be shifted absent good reason to do so fully copes with the complexity of the relationship between two innocent parties, T and P. Under orthodox tort theory, this idea makes sense: where losses are shifted because of the negligence of the defendant, and such negligence is not proven, there is no reason to shift the loss from plaintiff to defendant. (As an aside, it might be thought that contemporary tort law has strayed a good deal from this theory, whether tacitly or expressly. Recent developments in the field of torts complicate the field of tort-conflicts, of which more later.) In *Maspons v. Mildred,* two parties are contracting against the differing backgrounds of two systems of law. Each of those systems would allocate the loss. To throw up one's hands and conclude that neither legal system is relevant may be to sidestep a problem which each of the legal systems clearly saw as a problem with which it must cope.

3. If one were to consider the *Maspons v. Mildred* case as occurring in a legal vacuum, i.e. absent rules and legal backdrops, arguments could be made for *either* party bearing the loss, for letting it lie, or for splitting it. However, the existence of a legal backdrop can provide convincing reason why one or the other of the parties should bear the loss. That is, the rules that each of the common law and civil law systems have formulated are not *inherently* fair; rather, they *conduce* to fairness, in the sense that they allow parties operating within legal contexts to order their affairs accordingly, so that losses are not left to fall capriciously. The common law does so via a rule favouring principals. The civil law does so via a rule favouring third parties. Where P is in a civil law jurisdiction and T is in a common law jurisdiction, both rules break down, absent evidence that *both* parties intentionally contracted against one or the other of the two legal backgrounds.

No such evidence is present in *Maspons v. Mildred*. We can then either assume that T contracted against the background of English law and P against the background of Cuban law, or that they contracted against an international background, which is to say a background of no rules. Under either analysis, neither party could reasonably *expect* protection. Indeed under the first analysis, both parties could expect to lose.

Given this view of the parties' expectations, there is no *reason* to apply either English or Cuban rules. Neither are based on inherent fairness. Both purport to order relationships, and neither succeeds in doing that in this case.

At this juncture in our reasoning process, we can let the loss lie or split it. We know that, domestically, courts are adverse to loss-splitting. One might speculate

that this aversion owes something to a fear of facilitating judicial cop-outs. However, where careful analysis points out that there is no good reason to inflict (or leave) the loss on (or with) one of two parties, this fear might be misguided. Particularly where the case engages more than one legal system, the admission that no one party deserves to win outright might be the best solution; in a geographically complex case such an admission in no way dilutes the value (in terms of predictability and certainty) of the rules of each separate jurisdiction.

4. *Maspons v. Mildred* introduces the third term that we shall use in our analysis of conflicts cases, the "no conflict" case. It is sometimes referred to as the "unprovided-for-case". See, e.g., Crampton, Currie & Kay, *Conflict of Laws*, 4th ed. 1987, pp. 282-87. Such a case is one where the purposes of neither rule would be forwarded by their application to the facts of the case. In other words we have no reason for doing anything with the case. A decision could be justified on the ground that the plaintiff has given no compelling reason why the loss should be shifted to the defendant. Traditional conflicts analysis has no methods for either identifying or handling such a case. (Though Morris can see that *Bondholders* is a "false conflict". Why can't he see that *Maspons v. Mildred* is, if you like, a "double false conflict"?) Rule 168 in *Dicey & Morris* states: "The rights and liabilities of the principal as regards third parties are, in general, governed by the proper law of the contract concluded between the agent and the third party."

Maspons v. Mildred is referred to as an authority for this rule. This rule is a rather delightful sidestepping of the issue, for underlying the different rules in that case is the fact that whether T or P bears the risk of A's insolvency depends on whether A is a contracting party. In the common law, there can be no contracts between T and a disclosed A: the only contracting parties are T and P. This is the reason a person cannot sue a store clerk personally for breach of the contract of sale made between the person and the store.

5. The interesting feature of *Maspons v. Mildred* is that it is a difficult case precisely because there is no contracts answer. The case is, as we shall see, analogous to a *tort* case: the focus is on loss distribution. This point leads to a further interesting speculation, is it possible for there to be a "no conflict" case in contracts? There do not appear to be any contracts cases of this kind. All the "unprovided-for-cases" discussed, for example, by Crampton, Currie & Kay are torts cases. As we shall see, even some torts cases that might at first sight appear to be "no conflict" cases, later turn out to be false conflict cases. The answer to this problem lies, we believe, in the fact that in contracts cases there is always a "fall-back" position: we enforce the contract unless there is a good reason not to. Notice that there is no "fall-back" position in the facts of *Maspons v. Mildred*. The absence of a "fall-back" position, of a common shared value (like the value of enforcing contracts) suggests that conflicts cases may, as the

preceding note suggests, require a solution that is not the solution that either jurisdiction would reach in every domestic case. Do we always have a "fall-back" position in every domestic case? If so, what is it? Can it provide a principled solution to conflicts cases?

6. The next case takes us back into an area that is, at least in appearance, close to contracts. Once again this appearance may be an illusion. The case is always cited in connection with the proper law of the contract. What are the *contracts* issue? How would you defend the decision if you were asked to do so? Is there a choice of law issue here? An understanding of the traditional agency-conflicts rules may be a helpful background to an attempt to answer these questions.

The traditional conflicts approach to agency cases is summarized by E. Goldfarb, in "Agency and the Conflict of Laws: a Critical Reassessment" (1977), 35 *U.T. Fac. L. Rev.* 26.

> . . . The salient features of what I have termed the "traditional approach" to such cases can be summarized as follows:
>
> (1) An agency was considered to involve two contracts: The first was the internal contract between the principal (P) and the agent (A). This has been termed the "contract of agency". The second was that contracted between A and the third party (T). By a legal fiction this contract was also deemed to be a contract between P and T (the "third party contract").
>
> (2) The issue giving rise to the conflict of laws was held to be within the scope of one or the other of these two contracts.
>
> (3) The choice of law issue was then resolved by the application of the choice of law rule for contracts: that is, the proper law of the relevant contract was held to be the law which governed the issue in question.

Goldfarb elaborates on the traditional approach, at p. 28, as follows:

> As in other conflict of laws situations, the choice of law issue in agency cases has traditionally been resolved by the mechanical application of rules. Early cases established two rules which have been restated by Dicey thus:
>
> > *Rule 167*: An agent's authority, as between himself and his principal, is governed by the law with reference to which the agency is consti-

tuted, which is in general the law of the country where the relation of principal and agent is created.

Rule 168: The rights and liabilities of the principal as regards third parties are, in general, governed by the proper law of the contract concluded between the agent and the third party.

Although Dicey argues that the question of P's liability falls within the scope of Rule 168, some cases have recognized a third rule, based on the view that A's authority can be treated as distinct from the contract of agency and the third party contract. The power of A to bind P is, in this view, determined by the law of the country in which A acts, at least in situations where P has authorized A by power of attorney to act for him in that country.

This third rule was applied in the case we shall now examine:

Chatenay v. Brazilian Submarine Telegraph Co. Ltd.
[1891] 1 Q.B. 79.
(C.A., Lord Esher M.R., Lindley and Lopes L.JJ.)

Appeal from a judgment of Day J. on a preliminary issue.

The facts stated in the Report were:

In the year 1880 the plaintiff, who was a Brazilian subject and resident of Brazil, executed, in favour of one Broe, a stockbroker carrying on business in the City of London, a power of attorney to purchase and sell shares in public companies and public funds. The power of attorney was in the Portuguese language, and was executed by the plaintiff in Brazil with the formalities required by Brazilian law. Broe, purporting to act under the power of attorney, disposed of certain shares in the defendant company which were the property of the plaintiff and registered in his name. Broe did not account to the plaintiff for the proceeds of the sale of these shares, the purchasers of which were registered as owners in the books of the company. The plaintiff issued an originating summons asking for the rectification of the register by inserting therein his name as holder of the shares, and an issue to be tried by a jury in London to determine whether the plaintiff was entitled to have the register so rectified. Before this issue came on for trial an order was made that the question whether Brazilian or English law was to govern the construction of the power of attorney should be tried by a judge without a jury. The matter came on before Day J. who decided that English law was to govern the construction of the power of attorney, and a certificate to that effect was accordingly made out.

The defendants appealed.

LORD ESHER, M.R.:— In this case a person resident in Brazil and carrying on business there wrote down that which he intended to be an authority to an agent, if that agent would accept the delegation. The person whom he desired to be his delegate did afterwards accept that delegation. The question raised is, what is the meaning of that document? Now, I agree that it has one meaning, and no more: and the question is, what was the meaning of the plaintiff when he wrote

in England, we should infer that the meaning of the parties and the true construction of the contract were that it was to be carried out according to English law. If we find that the authority might be carried out in England, or in France, or in any other country, we come to the conclusion that it must have been intended that in any country where in fact it was to be carried out, that part of it which was to be carried out in that country was to be carried out according to the law of that country. That would be putting one construction only on the document, and not putting a different construction on it in different countries. The one meaning that he had was, "I give an authority which if carried out in England is to be carried out according to the law of England; if in France, according to the law of France." That is one meaning, though this authority is to be applied in a different way in different places.

If that is so, then the way to express that in the present case is this. This authority was given in Brazil, and the meaning is to be established by ascertaining what the plaintiff meant when he wrote it. The authority being given in Brazil, and being written in the Portuguese language, the intention of the writer is to be ascertained by evidence of competent translators and experts, including if necessary Brazilian lawyers, as to the meaning of the language used; and if according to such evidence the intention appears to be that the authority shall be acted upon in foreign countries, it follows that the extent of the authority in any country in which the authority is to be acted upon is to be taken to be according to the law of the particular country where it is acted upon.

. . .

Now, that I consider to be a mere expansion of the judgment of Day J. It is the same judgment, but it is in an expanded form. His judgment, therefore, is not altered, but is held to be a correct judgment, although we express it in an expanded form. It follows that the appeal fails, and must be dismissed.

[Lindley L.J. gave a short concurring judgment, and Lopes L.J. agreed in the result reached by both of the judgments.]

NOTES AND QUESTIONS

1. *Chatenay* implicitly deals with the agency principle (in contrast to the *contract* principle) that A might have the power to bind P in excess of the power given to him by P. Whether or not A has such power in a particular case, in agency law, depends on whether A had apparent authority to bind P in the manner in which he purported to do *vis-à-vis* T. The principle of protecting T's in cases where A acted within the scope of his apparent authority is common to both Brazilian and English law. The point of possible divergence between the two systems of law concerns the scope of that apparent authority. The question on which the case, domestically, would turn is, "What is the apparent authority of A on these facts?"

2. The court articulated a choice of law rule regarding the scope of apparent authority, as follows: ". . . if . . . the intention [of the P] appears to

be that the authority shall be acted upon in foreign countries, it follows that the extent of the authority in any country in which the authority is to be acted upon is to be taken to be according to the law of the particular country where it is acted upon." English law was thus applied to determine the extent of A's (apparent) authority.

3. The principle which appears to underlie the judgment—though not clearly articulated by the court—is that where P sends his A into a foreign jurisdiction he is aware and can expect that that jurisdiction's law might be applied in determining the degree to which he is responsible for A's acts. This determination is quite different from the determination of a contractual dispute. That is, the analysis cannot be confined to a contracts-conflicts approach, whether we focus on the P-A contract or on the P-T contract (which last contract some view as a convenient fiction which allows the contract concluded between A and T to be seen as a P-T contract).

4. The question would then be whether in formulating a choice of law rule with respect to the scope of A's authority, the court might just as logically have placed the risk of loss on T where T is aware that the agency relation was created in a foreign jurisdiction. Is there any particular reason to prefer T's, as the court's rule does? Is the notion that P's rights and liabilities should be decided according to foreign law (whether or not adverse to him) correct? What possible factors might enter into a determination of the scope of A's authority, if we were to abandon traditional rules for choosing jurisdictions? What might be the reasonable expectations of P's and of T's with regard to the consequences of A exceeding his actual authority in multistate transactions? Is the statement (accepted in *Chatenay*) that P expects to have the law of the place where the agent transacted business applied any more or less convincing than the argument that "when both P and T are innocent and no law protecting either is relevant (or more than one is), it would be more reasonable to choose to apply the law of the country whose rule would place upon P the burden of his agent's improper act." Goldfarb, in "Agency and the Conflict of Laws", *supra*, at p. 32.

If we assume that the English law was intended to protect English Ps, and the Brazilian rule to protect Brazilian Ts, what should we do when there is a Brazilian P and an English T?. Can we, as Goldfarb suggests, state a "principle of preference" for conflicts of this sort? This question, in turn, raises the question of what we mean when we say that a law "intends" some result. When can we say that might the law of one jurisdiction "intends" to protect only the people of that jurisdiction, so that that law becomes irrelevant if the person invoking its protection is not one of the people of that jurisdiction? Such a narrow view of the ambit of a rule of law may or may not be justified, depending on the nature of the law. It is crucial, then, to look at the nature of the laws in issue in *Chatenay*.

5. A first principle in agency law is to place the onus on T's to demand proof of A's authority; if T does not do so, and it turns out that A exceeded his authority, the loss will fall on T. This first principle, however, is displaced (for reasons of business efficiency and fairness) by a second: where A acts within the scope of his apparent authority, P, who created the agency relationship and gave the appearance of authority, is held responsible for his agent's acts.

6. Goldfarb's statement with regard to *Chatenay* seems to focus on this second principle, insofar as it prefers Ts. Her caveat on the principle of preference (*viz.*, that both P and T are innocent) may, however, leave one with the feeling that she has not answered the agency question in the case.

7. The court's approach does not have recourse to either of the above stated agency principles in its choice of law process. However, the *result* of that process is that English law is chosen to govern the case. At that point, both of the agency principles referred to will enter the process of dispute resolution. It is important to note, however, that the choice of law process itself is undertaken in the abstract, in the sense that it is carried out without regard to the agency principles relevant to the dispute. That is, the court's analysis perceives the choice of law process as a preliminary issue, in itself abstracted from those agency principles which would be the focus in a domestic case.

8. Goldfarb's analysis seeks to ask whether there is a *reason* to apply either Brazilian or English agency rules. Having concluded—whether or not convincingly—that there is no reason to apply either law, she develops a particular conflicts rule geared to agency principles. This rule, or principle of preference, might be seen as a third substantive agency law, which coincides with neither the Brazilian nor the English law. Does this rule seem to you to be a good one? Is it overly comprehensive, and if so what factors should be introduced to endow it with more flexibility? Answers to these questions naturally would involve a serious grasp of agency law. For the purposes of this course, it is more to the point to recognize that the complexity of substantive laws cannot be ignored in developing approaches to conflicts of laws.

9. The *Chatenay* case confronts two laws which are essentially the same, *viz.*, that Ts are protected when agents act within the scope of their apparent authority. The principal question, then, should be as to what "apparent" comprehends. When it is reasonable for T to assume that A is acting within his authority, T is protected under both English and Brazilian law. The facts that might give us some clue as to T's reasonableness in *Chatenay* are absent from the judgment. The court does not tell us *why* their English legal minds would see T as being reasonable, or *why* Brazilian legal minds would (as the judgment seems to assume) see T as being unreasonable.

10. In *Chatenay*, too, we are left to wonder *why* the court assumes that under English law A's acts were outside the scope of apparent authority, whereas under Brazilian law, those acts were within that scope. For all that we can tell from the judgment, a careful examination of the Brazilian and English laws *might* have yielded the same result. Whichever legal cap one dons, apparent is apparent is apparent. Moreover, synonyms for apparent also mean apparent. The trap of semantic sham should be avoided where possible.

11. Goldfarb's approach may be preferred to that of the court insofar as it *begins* with the agency issues in mind. However, the satisfactory resolution of geographically complex agency cases cannot be assured merely by replacing choice of law rules which operate in the abstract by choice of law rules which incorporate the substantive issues of the dispute, be they contract, agency, or tort issues.

12. There is no easy answer to the *Chatenay* problem, but if we are to develop alternatives to what we perceive to be irrational decision-making processes, we must probe the alternatives: Do they operate more rationally? Are their imperfections less disturbing than those of the traditional rules? It is also important that in our efforts to develop better approaches, we bear in mind the dangers of overly expansive rules. Rules are made to meet particular fact situations, and inroads on them (which inroads become new rules) are needed in order to accommodate different fact situations. To begin an analysis of a conflicts problem by focusing on the issues that would be considered important in a domestic case requires that we also note the particular facts, as we would do in a domestic case.

13. *Dicey & Morris* also claims that *Chatenay* supports Rule 168. Is it not apparent that such a rule is pregnant with unarticulated assumptions that are completely ignored? Does it help to regard the basis for making P liable when A acts without the scope of this apparent authority as an estoppel? Is there an important characterization issue here?

14. Can you suggest a solution to the following problem? The facts are those of *Ruby Steamship Corporation Ltd. v. Commercial Union Assurance Co. Ltd.* (1933), 150 L.T. 38; 39 Com. Cas. 48 (Eng. C.A., Scrutton, Greer and Romer L.JJ.).

> In England an insurance broker, as agent for the insured, is liable to the underwriter for payment of the premiums. The underwriter cannot cancel the policy because of an insured's non-payment. The broker can cancel only with the authority of the insured. In the United States a broker is not liable to the underwriter for payment and has, therefore, no interest in the cancellation of a

policy. Rather, the underwriter may cancel if the insured fails to pay. In the *Ruby Steamship* case an American broker purported to cancel a policy placed with an English underwriter without the consent of the insured. The insured sued the underwriter after its ship sank. Scrutton L.J. applied New York law (i.e. the proper law of the contract between principal and agent) not English law (i.e. the proper law of the contract between agent and third-party underwriter) to relieve the English underwriter of liability to the insured. Is it relevant that the insured was a Canadian company which purchased the ship with insurance already in place?

Chapter 12

Torts Revisited

INTRODUCTION

We have seen that the analysis of the traditional type in contracts conflicts cases was unresponsive to any contracts values. At the same time, of course, we saw that the rules were so open-textured or vague that any result could be justified under the proper law approach. This feature of the rules at least permitted a court to be covertly responsive to contracts values. A much more serious problem exists in torts cases with traditional conflicts rules. Here the rules are worded in a much more peremptory way and, by their excessive focus on the law of the forum, prevent any real possibility of there being even a covert response to tort values. Yet, as you might have expected, even there the pressure upon the courts to decide cases satisfactorily cannot be denied and courts occasionally struggle mightily to reach satisfactory results.

We can do what we did in our examination of contracts cases to see what might be behind some of the torts cases. First, we can set out what might be the torts issues underlying the conflicts cases. Tort cases involving choice of laws issues tend to be more difficult than contracts ones, perhaps because the situations giving rise to torts disputes are more numerous and various than those which precipitate contract actions. Contract cases deal principally (though not exclusively) with commercial exchange realtions, while torts cases can be of a commercial or non-commercial nature and can concern not only damage to the pocketbook but also injury to one's person, family, reputation, dignity or property. This diversity is obvious if we simply list some common tort actions: battery, defamation, deceit, nuisance, unfair competition, trespass, inducing breach of contract, etc., as well as negligence. It is not clear what any of these actions have to do with one another apart from that fact that they are all labelled torts. That being the case it is perhaps strange that we should think of having a single choice of law rule for all tort actions. The matter is further complicated when we begin to consider various tort-like statutory causes of action, such as the actions for wrongful death created by the *Family Law Act*, R.S.O. 1990, c. F.3, and the *Fatal Injuries Act*, R.S.N.S. 1989, c. 163. Are those to be considered to be tort actions, with the consequence that their spatial applicability should be determined by the choice of law rule in tort? What about claims under workers compensation or criminal injuries compensation statutes?

Even if we assume that those various causes of action have enough in common to be grouped in the same family and dealt with by the same choice of law rule, it must be noted that these various "torts" seem to respond to a number of different policy concerns. These include deterrence, loss distribution, and social insurance. In the alternative it is possible to view tort law not as a collection of judicial and statutory policy initiatives, but as an exercise in rationality and morality. Given this diversity, developing a choice of law approach which responds to the principles of tort law is no easy matter.

A good statement of the issues raised by tort claims is found in J.G. Fleming, *The Law of Torts* 7th ed. (Sydney: The Law Book Company Ltd., 1987) pp. 2-13.

ANALYSIS OF THE CASES

Phillips v. Eyre (summarized, Vol. I, pp. 115, 118) The narrow question in this case was whether the Jamaican *Act of Indemnity* should be given effect in England. It is hard to see what concern it would be of England law that poor Mr. Phillips was harshly treated by the Governor and his remedy would appear to be political not legal. (The ultimate responsibility of the United Kingdom government for the acts of its colonial administrators and the extent to which it should be able to shelter behind puppet legislatures is a question that raises important issues that are outside the scope not only of this course but probably of any course in torts as well.) The big mystery for our purposes is, of course, that the case ever became a "leading case". The case of *The Halley*, the case that gave rise to the first rule, has convincingly been shown (Kahn-Freund, "Reflections on Public Policy in the English Conflict of Laws" (1953), 39 *Tr. Grot. Soc.* 39) to be the expression of a view of English public policy—the Privy Council found the Belgian law that the owners of a ship were liable for the negligence of a pilot that they were compelled to employ offensive to their notions of *laissez-faire* economics. It is ironic that the English legislation adopting the same loss-distribution scheme as Belgium was passed about ten years later. (The continued acceptance of a common law rule reversed by legislation is one of the mysteries of common law doctrine.)

The treatment of the words of Willes J. as if they were of statutory origin is parallelled by only one other case (also associated with Willes J. who was there the successful barrister), *Hadley v. Baxendale* (1854), 9 Exch. 341, 156 E.R. 145. Under any reasonable approach to the doctrine of precedent, Willes J.'s language should be treated as no more than obiter and of relevance only to the facts of the case before him. The attitude to the case illustrates once again the mind-numbing results of the simple invocation of "conflict of laws."

Chaplin v. Boys (Vol. I, p. 120). This case is always treated as unquestionably correct and fair. We have major reservations on both these points. The issue was the measure of damages in an action for personal injuries arising out of a motor vehicle accident. We note the following points:

(a) While much might be said for an approach to damages that permits, as the Maltese rule may, periodic applications to the court for further compensation, the fact was that the plaintiff was in England and if he were to get any recovery, he would have to get in under English law.

(b) English law only permitted a single award of damages in one lump sum.

(c) The Maltese limitation on recovery may reflect either a view of human nature that requires a more stoic acceptance of fate or a different view of how the losses arising out of motor vehicle accidents should be allocated. As our own

experience in Canada and in Ontario vividly illustrates, there is no uniquely correct view of what "adequate" or "proper" damages for pain and suffering might be.

(d) We cannot ignore the insurance background or context. What people take out as usual automobile liability insurance will be a reflection of the pattern of insurance awards in that jurisdiction. We may choose to ignore the actual insurance facts in a wholly domestic case, but we cannot justify doing the same in a conflicts case when the parties' expectations might be affected by the insurance context. Note, for example, that Morden J.A. makes this fact relevant in *Grimes v. Cloutier*, Vol. I, page 150. If we look at the insurance facts, we might ask:

(i) Is public liability insurance coverage for drivers in Malta required, common or rare?

(ii) What are the expected limits of such insurance?

(iii) What expectations might the defendant reasonably have had of the risks that he was running by driving in Malta? and

(iv) What expectations might the plaintiff have had?

These questions are not related to any of the questions that are generally regarded as conflicts questions: they are, however, related to the basic tort question, "How much of the loss that the plaintiff suffered do we shift to the defendant?" In the context of a judicial answer, we have also to consider why we shift any particular loss to the defendant. There is little justification in the judgments in the House of Lords for the allocation of the loss that the judgment reaches. The House seems to regard it as sufficient that the parties were English. But what does that mean? Does it mean that they insured in the English model? Does it mean that the defendant would not be caught by surprise by being made liable to the English amount? (Remember that the House does not suggest that there result would be any different if the plaintiff's losses were £2,000,000 rather than £2,250.) What facts might make up the components of the parties' expectations? Is it, for example, relevant that the plaintiff might have been said to take the risk of driving in Malta. (The fact that he was a member of the British armed forces may suggest that the British government should be responsible for his losses: this fact says nothing about the defendant's liability.)

The difficulties in the case are compounded by the casual assumption that the result might be different if the parties were Maltese. What does it mean to be a "Maltese" party? Does driving in the Maltese context make one "Maltese"? The questions are endless.

We shall return to these issues. For the moment, it is sufficient to notice that these questions suggest that the result in the case is far from obviously satisfactory. The approach of the Ontario Court of Appeal in *Grimes v. Cloutier* suggests that the result should probably be that

the Maltese limitation on recovery should be applied—the plaintiff's expectations would not be defeated, while the defendant's would, perhaps, be protected. In any event, a focus on the issues that these questions raise is likely to be more useful than the analysis of the House of Lords.

Within this context, it would not be particularly difficult to deal with the problems of quantification if all that was at stake was the amount that the plaintiff would receive as a lump sum award rather than through periodic payments. What is, of course, equally clear is that the characterization of the English rule as "procedural" rather than "substantive" will not advance our thinking much.

McElroy v. McAllister (Vol. I, p. 133) What else can we say? As we have suggested, what is most frightening about this decision that some judges in the House of Lords in *Chaplin v. Boys* regarded *McElroy* as correctly decided. Notice that the result is one that neither jurisdiction, acting on its own, would have reached. If both would reach the same result in two domestic cases, what possible reason is there to justify giving the plaintiff nothing? The result appears superficially to be consistent with the argument made following *Maspons v. Mildred* (*supra*, page ?) that the case in an "unprovided-for-case". But it is not, is it? It is not that English law cares (whatever that word may connote) only for plaintiffs and that Scottish law cares only for defendants. In fact, English law was not concerned with how the risk of this loss was allocated: whatever happened the loss would never be never be borne by English motorists or taxpayers. (We ignore here and for the purposes of this analysis, the gross economic imbalance between Scotland and England and the likely fact that English taxpayers would ultimately finance some Scottish welfare costs.) How can judges be so blind to the consequences of what they do or say?

McLean v. Pettigrew (Vol. I, p. 135) The result is, of course, eminently sensible. It is hard, however, given the language and approach of the judgment to regard it as the triumph of good sense over silly doctrine, but the court was determined not to apply the bizarre Ontario statute. As we have suggested, the solution lay in the Supreme Court of Canada taking the view that the Ontario legislation simply did not apply: no purpose of Ontario law would be forwarded by its application in the case.

Another way to look at this case is to adopt the kind of reasoning that is more common in contracts cases than in torts ones. When issues of the validity of a contract is raised in contracts litigation, it is possible to take the position that, once the plaintiff has shown that there was, for example, an agreement signed by the defendant, the agreement will be enforced *unless* the defendant gives a good reason why it should not be. A "good reason" in such a context might be the presence of fraud, unconscionability or something similar. What makes this kind of reasoning possible in contracts is the presence of a generally accepted principle that, absent special circumstances, a contract should be enforced. There is no directly analogous principle in torts. We could, however, develop a principle that might be: "Once the plaintiff has shown loss and that the defendant was guilty of fault, then, absent some special circumstances raised by the defendant, he or she should normally be held liable to the plaintiff." Perhaps such a policy (or starting point for legal reasoning) exists in the law regarding negligent

misrepresentation. If we could reason in this way, once the defendant in a case like *McLean v. Pettigrew* has been shown to be negligent, he will be liable to the plaintiff unless he can shown that he should be excused. This principle can be seen to be part of the law of both Ontario and Québec. As such, it will be applied by courts in both provinces unless there is some reason to protect the defendant. Such a reason might be provided by the Ontario "guest-passenger" statute, but that statute can, on analysis, be shown to be inapplicable to the particular facts of the case. We know that it is not easy to understand what the purpose of the Ontario legislation was, yet we also know that we cannot begin to consider how the statute should be applied unless we believe that it forwards some rational purpose.

The temptation facing those who see that the rules of *Phillips v. Eyre* do not work very well is to tinker and to suggest that different rules should be substituted. As a case like *McElroy v. McAllister* vividly illustrates, tinkering with the rules can be very dangerous. The fact is that so long as we have traditional rules, no satisfactory solution is possible, except by chance. In *Chaplin v. Boys* the House of Lords overruled *Machete v. Fontes*, which the Supreme Court had relied on in *McLean v. Pettigrew*. Would this mean that a different result should now be reached in another similar case to *McLean v. Pettigrew*? Notice as well the annoying comments in the House of Lords about *McLean v. Pettigrew*. Lord Wilberforce observes that *Machete v. Fontes* has, on occasion, been found "useful". (See, e.g., Vol. I, p. 125) How, *within the context of the traditional rules*, would he know what is or is not "useful"? Those rules have nothing to do with any notion of utility: they are applied blindly and without thought for the consequences. The mere mention of a test of utility in the application of choice of law rules is as antithetical to all that the traditional approach to conflicts stands for as is a discussion on false conflicts.

McLean v. Pettigrew illustrates one pervasive problem of the law, one that can sometimes appear prominently in conflicts cases. We have trouble with the Ontario legislation because it is hard to discover a rational purpose for it. The Ontario courts disliked the legislation and strove to limit its scope. A passenger who, for example, bought gas in the course of a trip in a friend's car was not a gratuitous passenger within the meaning of the statute. Similar treatment has been accorded to other common law and legislative rules. The courts, for example, did not like the rule that a plaintiff who had been contributorily negligent could not recover from the defendant and they limited the scope of the rule by a number of devices. The legislative solution, permitting the court to apportion fault and to force contribution from joint tortfeasors, largely removed the need for judicial sleight of hand. The *Statute of Frauds* has never been applied as a plain reading of its provisions might have indicated. It makes no sense to assume in a conflicts case that rules have purposes that are wider (or more enthusiastically supported) than domestic courts are prepared to recognize.

This argument suggests that even if the plaintiff in *McLean v. Pettigrew* had been so ill-advised as to sue in Ontario the action should not necessarily have had to be dismissed. Even an Ontario court could note the foreign facts, the purpose of the statute—whatever it might have been—and say that the presence of the foreign facts took the case out of the statute. What is more important to note is that once we abandon choice of law rules, the chances of actions in both

provinces reaching the same conclusion are greatly enhanced. If the Supreme Court of Canada were to hold that the Ontario statute should not apply to an action by a Québec passenger against a Québec driver, that decision, as an interpretation of the Ontario *Highway Traffic Act*, should be binding on the Ontario Court of Appeal as well as on the Québec Court of Appeal. It is neither a paradox nor by chance that the abandonment of choice of law rules should lead to uniform conclusions for, once we look at the tort issues we shall often find that the purposes of the underlying rules suggests that only one result will make sense. It should go without saying that uniformity in the statement of a rule rather than in the result of two identical cases is not the kind of uniformity that anyone should care to seek. Sometimes we have the impression that those who argue that traditional conflicts analysis will achieve uniformity believe that agreement over the form of the rule is alone sufficient.

O'Connor v. Wray (Vol. I, p. 141) This case is, as we shall see, a fruitful source of discussion. Cases like *Bondholders v. Manville* (Vol. I, p. 89) have, as we have pointed out, sometimes been analyzed as "false conflicts" as a case like *Lilienthal v. Kaufman* (*supra*, p. ?) is a "true conflict" and *Maspons v. Mildred* (*supra*, p. ?) is a "no-conflict" or "unprovided-for" case. Both Morris (the late editor of *Dicey & Morris*) and Castel, *Canadian Conflict of Laws*, 2nd ed. p. 37, acknowledge, as we have seen, the existence of such concepts as a "false conflict"—in spite of the fact that to examine the content of the rules in conflict violates the fundamental requirement of traditional jurisdictional-selecting choice of law rules. *O'Connor v. Wray* may, depending on just how we formulate the competing rules of both Québec and Ontario be a strong or weak "true conflict". What is important now to notice is the extent to which legislation has provided a solution to the problem.

We have already looked briefly at the provisions of the *Insurance Act*, R.S.O. 1990, c. I.8. (Vol. I, p. 178). It is worthwhile re-examining them:

> 252(1) Every motor vehicle liability policy issued in Ontario shall provide that, in the case of liability arising out of the ownership, or directly or indirectly out of the use or operation of the automobile in any province or territory of Canada,
>
> (a) the insurer shall be liable up to the minimum limits prescribed for that province or territory if those limits are higher than the limits prescribed by the policy;
>
> (b) the insurer shall not set up any defence to a claim that might not be set up if the policy were a motor vehicle liability policy issued in that province or territory; and
>
> (c) the insured, by acceptance of the policy, constitutes and appoints the insurer his irrevocable attorney to appear and defend in any province or territory of Canada in which action is brought against the insured arising out of the ownership, use or operation of the automobile.

Had Québec had in 1930 a provision like s. 252—it was not enacted in Ontario in its present form until 1966 (S.O. 1966, c. 71, s. 11)—the defendant's insurer could not have raised the defence based on the first rule in *Phillips v. Eyre*. As we have mentioned, the scope of paragraph 252(1)(b) is not clear. It would, we think, extend to make a Québec owner respond

(through his insurance coverage) for the torts of a person driving his car in another province with his consent. This effect says something very important about the traditional rules and, as we shall see, about the permissible ways of resolving "true conflicts" in the Canadian context. We shall return to this issue later.

THE "PROPER LAW OF THE TORT"

Before going further, it is necessary to deal with one other issue. You will remember that in *Grimes v. Cloutier* Morden J.A. quoted Dean Horace Read of Dalhousie. Dean Read had offered a different solution to the problem of *McLean v. Pettigrew*. Morden J.A. said: (Vol. I, p. 153)

> This is shown in the analysis by Horace E. Read at pp. 60-61 of the *Proceedings of the Forty-Eighth Conference of Commissioners on Uniformity of Legislation in Canada* (1966):
>
> > In *McLean v. Pettigrew* . . . a gratuitous passenger brought an action in Québec against a host driver of an automobile. The passenger was injured in an accident that occurred on an Ontario highway by reason of the negligence of the driver. Both the driver and passenger were domiciled and ordinarily resident in Québec, which was their place of business, if any, and the arrangements for the motor trip were made there.
> >
> > Applying the attached draft statute [set out *infra*], the contacts with Ontario were that it was (a) the place where the injury occurred, and (b) the place where the conduct occurred; while the contacts with Québec were that it was (a) the domicile and place of business of all of the parties, and also probably would be held to be (b) the place where the relationship of guest passenger and host was centred. The relevant policy of Ontario was clearly established by the Ontario *Highway Traffic Act* under which the passenger, being gratuitous, was not entitled to bring a civil action for damages against the driver. The policy of Québec was embodied in its rule that by reason of the driver's negligence he would have subjected himself to *quasi-delictual* liability. It is believed that under the draft statute, the Court in an action brought in Québec could easily and justifiably have held that Québec had "the most substantial connection with the occurrence and the parties" and so have applied the local tort law of Québec. To get this result the Court would not have had to resort to an artificial technicality and a fiction as did the Supreme Court of Canada in *McLean v. Pettigrew*.

The draft statute referred to by Dean Read was quoted by Morden J.A., in a footnote to his judgment. It is found on p. 58 of the *Proceedings*, already referred to:

Draft *Foreign Torts Act*

1. When deciding the rights and liabilities of the parties to an action in tort, the court shall apply the local law of the state which has the most substantial connection with the occurrence and with the parties, regardless of whether or not the wrong is of such a character that it would have been actionable if committed in this Province.

2. When determining whether a particular state has a substantial connection with the occurrence and the parties, the court shall consider the following important contacts,

(a) the place where the injury occurred;

(b) the place where the conduct occurred;

(c) the domicile and place of business of the parties; and

(d) the place where the relationship, if any, between the parties is centred.

3. When deciding which state, among the states having any contacts within Section 2, has the most substantial connection with the occurrence and the parties, the court shall consider chiefly the purpose and policy of each of the rules of local law that is proposed to be applied.

Notice that this statute has apparent similarities with the rules of the Restatement Second set out *supra* at p. ?. It differs from that proposal in one very important aspect. The Restatement Second has abandoned jurisdiction selecting rules. The rules of Restatement Second that correspond to the contracts rules that we have looked at are:

Restatement Second, Conflict of Laws

§ 145. The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principle stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to the law applicable to an issue include:

(e) The place where the injury occurred,

(f) the place where the conduct causing the injury occurred,

(g) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(h) the place where the relationship, if any, between the parties is centred.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

§ 6 was set out earlier, but may conveniently be repeated here. It provides:

> **§ 6 Choice of Law Principles**
>
> 1. A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> 2. When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
>
> (a) the needs of the interstate and international systems;
>
> (b) the relevant policies of the forum;
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
>
> (d) the protection of justified expectations;
>
> (e) the basic policies underlying the particular field of law;
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

Remember that the underlying purpose of the Restatement Second, as it is of the *Foreign Torts Act* is to require/encourage/permit different jurisdictions to reach uniform results.

The choices that the Restatement Second offers courts are between competing rules. Notice, for example, that the Restatement Second uses words like, "with respect to that issue", suggesting that different issues might be governed by different rules. As we saw in *Lilienthal v. Kaufman* (*supra*, p. ?) and as we shall see when we return to other American developments, many cases have explicitly adopted this approach.

The *Foreign Torts Act*, on the other hand, is explicitly "jurisdiction selecting", that is, it is within the structure of the traditional choice of law rules: it is not consistent with Restatement Second. In this it is simply another variation on *Phillips v. Eyre* that we saw in *Chaplin v. Boys* or *McLean v. Pettigrew*, and, at least in the minds of Morden and Griffiths JJ.A., in *Grimes v. Cloutier* or *Prefontaine v. Frizzle*.

The origin of the idea expressed in the *Foreign Torts Act* and one that is sometimes referred to in judgments is an idea developed by Morris, "The Proper Law of a Tort" (1951), 64 *Harv. L. Rev.* 881. That idea was based on the observation that the discussion of torts in the conflict of

laws was often, following the civil law, in a larger heading in conflicts texts called "Obligations". Morris suggested that it might be useful to apply the "proper law of the contract" to solve torts problems. A number of American decisions, with facts very much like *McLean v. Pettigrew*, offered examples where it would be, at least, preferable in terms of the result, to apply some other law than the then usual American choice of law rule for torts, *viz.*, that the law of the place of the wrong governed every aspect. As applied to the facts of *McLean v. Pettigrew* that rule would, of course, result in a judgment for the defendant. We saw the effects of this rule in *Haumschild v. Continental Casualty Company* (Vol. I p. 217) and the court's obvious determination to avoid it. The proper law approach would have permitted the court to reach the result it wanted without resort to the device of characterization.

There are obvious attractions in being able to adopt a different rule that appears to operate better in some cases. As we shall argue, we do not believe that the approach of the Restatement Second, the *Foreign Torts Act* or the "proper law of the tort" offers any useful, usable or principled solutions. In considering these suggestions, keep the following questions in mind:

(a) Is it likely, as a matter of fact, that the two jurisdictions involved will agree on the solution that they would reach in identical cases?

(b) It is possible that, as in *McLean v. Pettigrew*, the tort may, so to speak, arise out of an existing relation, but it is certain that many will not. What happens if there is no obvious proper law?

(c) Neither the Restatement Second nor the *Foreign Torts Act* require the discussion of the torts or any other values that might be at issue. Could Morden J.A., for example, have characterized the results of any cases as just or unjust, as meeting (or defeating) the expectations of any parties or claimed that the application of Ontario would, in the circumstances involved, be an "officious intermeddling" with the laws of another province?

As we mentioned earlier, Canadian provinces have not adopted this or any other statutory approach to choice of law in tort. There is, however, in the Yukon Territory a *Conflict of Law (Traffic Accidents) Act*, R.S.Y. 1986, c. 29. It is based, not on the *Foreign Torts Act*, but on a Hague Convention that sought to codify another version of a jurisdiction selecting rule.

We can now return to *Grimes v. Cloutier*; *Prefontaine v. Frizzle* (Vol. I, pp. 147, 159) These two cases are, as we have argued, very important. Though the judges in each case will deny it, both Morden and Griffiths JJ.A. departed radically from the traditional rules of torts. The following paper is a case comment on the two judgments.

Swan, "Conflict of Laws—Torts—Automobile Accident in Québec—Action in Ontario—'Paradigm Shift or Pandora's Box'"?—*Grimes v. Cloutier*; *Prefontaine v. Frizzle*" (1990), 69 *Can. Bar Rev.* 538.

[**Note:** This extract has been taken from the manuscript of the published paper and may differ slightly from the published one. The extract starts at p. 544.]

The Significance of the Judgments

It is my claim that the language of both judgments, that in *Grimes* more than that in *Prefontaine*, represents a paradigm shift; the adoption of a test for determining liability for a foreign tort that is not just a gloss on the accepted rules but a complete rejection of their basis and the assertion of a radically new theory for the resolution of cases that present geographically complex facts. The term, "paradigm shift" is usually applied to revolutions in scientific thought. The term was, for example, invoked by Thomas Kuhn[31] to describe the kind of change that occurred when one scientific model, the Ptolemaic geocentric view of cosmology was rejected in favour of another incompatible and fundamentally different view, the heliocentric view of Copernicus. That change in the astronomical paradigm had a profound effect on all Western thought—as Gallileo's problems testify. A similar shift occurred with Newton's theories of gravity, Darwin's theory of evolution and Einstein's theory of relativity.[32] I do not believe that Morden J.A. intended to make such a shift in the law, but his language does not permit any other conclusion to be drawn. The implications of what he has accepted as the criteria for his decision cannot co-exist with the traditional structure of conflicts analysis. Griffiths J.A. is even more concerned than Morden J.A. to base his judgment on accepted principles, but his judgment cannot be accepted as being consistent with the traditional rules.

Of necessity my arguments in this paper must be brief and I shall do little more than make statements and claims that may provide a basis for and provoke a debate on the significance of what both judges said. This debate will, I hope, focus generally on the theoretical justification for traditional Conflicts doctrine and on how the results and language of the judgments can coexist with that doctrine.

Morden J.A. makes three statements in the quotation that I have set out above that I want to examine in detail:

(a) the "application [of the test in *Phillips v. Eyre*] results in what I consider to be a just decision on the facts of this case";

(b) "the appellants, residents of Québec, are legally entitled to the protection of [the Québec automobile compensation] scheme and had reasonable expectations that they would have this

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[31]Kuhn, *The Copernican Revolution* (Cambridge: Harvard University Press, 1957) passim.

[32]I hope that it is not hubris to claim that the Ontario Court of Appeal could share, in the microcosm that is conflicts, the vision of a Copernicus, Newton, Darwin or Einstein.

protection. On the other hand, it is difficult to believe that the respondent would have had any reasonable expectation that Ontario law would apply to the exclusion of Québec law with respect to any driving accident she might have in Québec"; and

(c) "to ignore the Québec legislation, which relieves the defendants of civil liability, would be unfair to the appellants and, also, an 'officious intermeddling with the legal concerns of a sister province'".

Griffiths J.A. makes similar statements:

(d) "it would not produce an unjust result to apply the law of Québec in those circumstances [i.e., where the plaintiffs were resident in Québec]";

(e) "It seems to me as well that it would not be within the reasonable expectations of the parties to apply Ontario law to a claim where the plaintiffs reside in Québec, the place of the alleged wrong"; and

(f) "it strikes me as unjust that the plaintiffs should take the benefits of the Québec legislation and then seek to avoid the application of Québec law in the action brought in Ontario".

"Just" Results and Reasonable Expectations

The content of the word "just" in the context of *Grimes* or "unjust" in that of *Prefontaine* is not elucidated by either judge. I shall make the claim that the content of that word is closely related to what Morden J.A. says in the second of his three statements and to what Griffiths J.A. says in the second of his. I do not for a moment believe, nor do I claim that judges are not always moved by considerations of justice. It is undoubtedly true that a very large proportion of the problems in most areas of conflicts have arisen from the perception of the courts that the rules had to be tempered to the facts. If the result of the simple or strict application of the traditional rules would cause some kind of "injustice", the courts have often found some leeway or looseness in the application of the rules to the facts before the court to achieve a more acceptable result. It is precisely this unsatisfactory and ultimately unprincipled nature of the traditional rules of the conflict of laws that makes them such poor guides to what courts will do; this "unreckonability" is the nature of what is in Pandora's Box.

Both Morden and Griffiths JJ.A., have, I believe, done more than find "looseness" or "leeway" in the rules; they have given content to the claim that the result the Court reaches is just. If we expand what both judges say, they state that justice lies in the protection of the defendants from a liability that they

> did not expect[33] and which the plaintiffs had no reasonable belief that they were entitled to.[34] I do not want to quibble over what people actually expect will happen should they be so unlucky as to be involved in a traffic accident, particularly when they are outside their home province. What is important now is that justice here has a "tort" content; the "just" result is one that respects what the Court believes is fair in a tort context.
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> The significance of this claim is that the solutions to the problems presented by the cases are not conflicts solutions, but torts solutions. Traditional choice of law rules in Conflicts—the rules that provide "conflicts solutions"—are intended to operate at some level above or at a stage preliminary to the actual rules of decision; the court is said to be choosing the "applicable law"[35]. In an important sense, such rules of choice between systems of law have no connection with "justice" except insofar as it is believed that rules of some kind are necessary to deal with the perceived choice that the court is required to make. The principal justification for choice of law rules is not that they express

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[33]Morden, J.A. is explicit in focusing on the expectations of the Québec defendant; Griffiths J.A. uses similar language but because his facts are different, he cannot as easily focus on the defendant's expectations to justify the result. A Québec defendant will not expect to be stripped of the protection of the Québec legislation because she injures an Ontario resident; the expectations of an Ontario driver in Québec are far harder to analyze. When Griffiths J.A. focuses on the "reasonable expectations of the parties" he is, I believe, looking as much to the plaintiffs as to the defendants. A Québec plaintiff can have no reasonable expectation of more generous compensation when she discovers that the negligent driver was in an Ontario car.

[34]While Morden, J.A. is specific in looking at the expectations of the plaintiff, Griffiths J.A. only touches on that aspect indirectly. Griffiths J.A. quotes (at p. 394-395, O.R., 284-285, D.L.R.) from a paper of mine, (Swan, "Choice of Law in Torts: A Nineteenth Century Approach To Twentieth Century Problems" (1988-89), 10 *Advocates' Quarterly* 57, at pp. 76-7) in which I said:

> The purpose of the common law rules for the compensation of those who have been injured by another's negligent driving must have some Ontario component to it. In other words, the purpose must serve some social policy of Ontario. . . A decision to apply Ontario law to benefit a member of the . . . class [of Québec resident plaintiffs] could be regarded as an irrational decision for an Ontario court to make. The decision permits the plaintiff to obtain recovery against a driver in circumstances where no Ontario purpose is served. Ontario has no purpose in using the law of torts to "punish" bad driving, or to regard Ontario drivers or car owners as undertaking, through their own assets or those of the insurer chosen by them, to protect anyone injured by them from loss wherever that loss might have occurred, and regardless of the circumstances that would link the plaintiff to the law of the place where he or she comes from.

[35]The "double-barrelled" rule of *Phillips v. Eyre* is assumed by Morden, J.A. to be a choice of law rule. That assumption is one that is commonly made.

any social value for the distribution of losses among drivers of cars and their victims, but that the rules provide certainty and discourage "forum-shopping".

When a Court deals with a problem by focusing on justice in the application of a rule in the particular circumstances of the case, as Morden J.A. does in *Grimes*, and as Griffiths J.A. does in *Prefontaine* with his focus on "injustice", there is no choice to be considered. In *Grimes* the rule being applied is that, under Ontario law, the holding of the defendants liable would be unjust and unfair to them, and to repeat what both judges said, it would impose on each defendant unexpected consequences. Similarly, making the defendants liable in *Prefontaine* would not forward any Ontario value or protect any expectations of the plaintiffs.

In making this determination in *Grimes* Morden J.A. is not choosing between Ontario law and Québec law; he is saying, as an Ontario judge, that it would be unfair to hold the defendants liable. The judgment that any other result would be unfair is based on the fact that the defendants would not have been liable under Québec law. Griffiths J.A. similarly has no need to choose between Ontario or Québec law. If a proper interpretation of the *Highway Traffic Act* and *Family Law Reform Act* is that Ontario law, as expressed in these statutes, should not be applied to protect these plaintiffs, making a choice between the law of Ontario and Québec is pointless for nothing depends on it: the choice of Ontario law rather than Québec law will not lead to liability.

The justification for the traditional rules of Conflicts was that those rules provided a method for achieving uniformity in the solutions that different jurisdictions might adopt for similar problems. It was assumed that uniformity would be achieved by the creation of a mechanism for choosing one rule of decision to govern classes of cases. I do not need to elaborate the obvious point that whatever virtue the rule in *Phillips v. Eyre* might have had, the achievement of uniformity of results regardless of the place where the plaintiff chose to sue was not one of them; those inconveniences were simply ignored. What Morden J.A. has done is to provide a principled basis for the conclusion that Ontario law, as expressed in the common law rules for tort damages and in the *Highway Traffic Act*[36], cannot be justifiably applied to make the defendants in *Grimes* liable to the plaintiff. Griffiths J.A. has provided exactly the same principled basis for his decision: the result in *Prefontaine* depends solely on the interpretation of the scope of the rules of Ontario. These decisions make the results in both Ontario and Québec the same on the same facts and the plaintiffs get no advantage by suing in Ontario.[37] "Forum shopping" is discouraged because those who might be plaintiffs will see no advantage in suing in Ontario.

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[36]R.S.O. 1980, c. 198, s.166(1).

[37]Dean Falconbridge, in the annotation to *McLean v. Pettigrew*, *op. cit.*, observes that, on the reasoning of the Supreme Court in that case, the result would have been the same had the action in Québec been brought by one Ontario resident against another for injuries arising from an accident that occurred in Ontario. Neither Morden nor Griffiths JJ.A. noticed or commented on this consequence of the judgment in *McLean v. Pettigrew*.

> In effect we have achieved the result that is consistent with the goal of Conflicts theory but without making use of the rule that that theory would have suggested we use.[38]
>
> As I have mentioned, the Court in *Grimes* did not follow the decision of the Supreme Court in *McLean v. Pettigrew*. Griffiths J.A. argued that *McLean v. Pettigrew* could be distinguished. Morden J.A. claimed that to have followed *McLean v. Pettigrew* would lead to an unjust result. It is usually said that the result in that case was "just". If so, the achievement of justice on the reasoning of Taschereau J. was purely by chance for there is nothing in his judgment that would indicate that he had such a consideration in mind,[39] and the rule he applied would, as Dean Falconbridge pointed out, have been as applicable to an action between two Ontario residents as to one between two Québec residents. Grange J.A. made this claim for *McLean v. Pettigrew* in *Lewis v. Leigh et al.*[40]. I agree with the conclusion that the result in *McLean v. Pettigrew* was just, but I have very different reasons than those that are usually given for coming to that conclusion. Grange J.A. gives no reasons for his conclusion, and while I understand what he obviously had in mind, I believe that a statement that a result is just must be justified or explained as must a statement that a result is

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[38]This statement is true even if we were to change the basic rule of *Phillips v. Eyre* by adopting any of the alternatives that have been offered to it. These alternatives include the various modifications of the rule as, for example, proposed in *Chaplin v. Boys*, [1971] A.C. 356, [1969] 2 All E.R. 1085, especially in the views of Lords Hodson and Wilberforce, by Morris, "The Proper Law of a Tort" (1959), 64 *Harv. L. Rev.* 881, as the "proper law of the tort" or by the *Foreign Torts Act* proposed by the Conference of Commissioners on Uniformity of Legislation in Canada, (1966), *Proceedings*, pp. 58-62. This proposed legislation and the analysis of Dean Read was referred to by Morden, J.A. as offering support for the Court's view of the decision in *McLean v. Pettigrew*.

[39]In fairness to Taschereau, J. I believe that he was convinced that, by applying a rule established by the English Court of Appeal in *Machete v. Fontes*, [1897] 2 Q. B. 231, he was achieving the just result. Such an assumption illustrates the problems of the traditional rules.

[40](1986), 54 O.R. (2d) 324 at 333, 26 D.L.R. (4th) 442 at 451,

> I think the conclusion of Henry J. [in *Going v. Reid Brothers Motor Sales Limited et al.* (1982), 35 O.R. (2d) 201, 136 D.L.R. (3d) 254.] that the law of Ontario should be applied is impeccable. . .
>
> It is my view that on the facts of the cases before us, the rule in *McLean v. Pettigrew*, i.e., the application of the law of Ontario subject only to the condition that the negligence be actionable in Ontario and punishable under the law of Quebec, is a just rule and should be applied. . . .

and the view of Dean Falconbridge, *op. cit.*

unjust. I have suggested elsewhere that there was a perfectly valid and easy justification for the result in that case.[41] I shall briefly restate my argument here.

In an action in an Ontario court the laws of any province other than Ontario have to be established by expert evidence.[42] The Supreme Court may take judicial notice of the laws of all provinces. In *Logan v. Lee*[43] counsel for the defendant in argument before the Supreme Court relied on the proof of the law of New Brunswick in an action brought in Québec. Sir Charles Fitzpatrick C.J.C. interrupted counsel and said:[44]

> I think it proper that I should here announce, after having consulted my brother judges, that this court, constituted as an appellate tribunal for the whole Dominion of Canada, requires no evidence as to what laws may be in force in any of the provinces or territories of Canada. This court is bound to . . . take judicial notice of the statutory or other laws prevailing in every province and territory of Canada, *sua motu*, even in cases where such laws may not have been proved in evidence in the courts below, and although it might happen that the views as to what the law might be, as entertained by the members of this court, might be [sic] in absolute contradiction of any evidence upon those points adduced in the courts below.[45]

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[41]Swan, "Choice of Law in Torts: A Nineteenth Century Approach to Twentieth Century Problems" (1989), 10 *Advocates' Quarterly* 57.

[42]See, *ibid.*, note 23, where the relevant provincial statutes regarding the extent to which courts in Canada may take judicial notice of the laws of other jurisdictions are mentioned. A recent case in the Québec Court of Appeal, *Laurentienne Générale Cie. D'Assurance Inc. v. Blanchard et al.* (1990), 68 D.L.R. (4th) 338, illustrates the significance of the rules regarding proof of foreign law. The court refused to consider as relevant to a review of a decision of a trial court the fact that the law of Ontario (which was relevant at trial) had been changed by the decision in *Grimes* between the date of the trial and the appeal. What is interesting about the judgment is the light thrown on the relation between the insurance schemes in Québec and the Ontario rules regarding tort damages. Exploration of this issue would take me far beyond the scope of this paper.

[43](1907), 39 S.C.R. 311.

[44]*ibid.*, at p. 313.

[45]The Chief Justice relied on the decision of the House of Lords in *Cooper v. Cooper* (1888), 13 App. Cas. 88.

> The Supreme Court in *McLean v. Pettigrew*[46] could have, and indeed should have interpreted the Ontario *Highway Traffic Act* as if it were acting as an Ontario court, and as if the question of the proper scope of that act had been raised in argument. Had it done so, it could have held that the provisions of the act that denied a gratuitous passenger a right of action against the driver were not applicable in the circumstances of the case.[47] There is nothing that prevents a Court from determining that the purpose of a statute will not be forwarded by its application on the facts of a particular case and the presence of geographically complex facts may well be relevant in that process. Morden J.A. must have done precisely this with the Ontario *Highway Traffic Act* on the facts of *Grimes*. Griffiths J.A., of course, interpreted the Ontario legislation by restricting its scope to Ontario residents. The process of "interpretation" of common law rules has exactly the same features as that of any statute: "Will the purpose of the rule, principle or standard be forwarded by its application to the facts of the case under examination?" There could hardly be a better authority for determining the scope of an Ontario act than the Ontario Court of Appeal. Had the Supreme Court of Canada dealt with the problem of *McLean v. Pettigrew* as I have just suggested then an action brought by the same plaintiff against the same defendant in Ontario would have reached the same result as did the judgment in the Québec action. Uniformity of result is achieved because there is no reason to deny any Québec plaintiff a remedy against a Québec driver.[48]
>
> I shall offer one other example of a situation similar to that in both *McLean v. Pettigrew* and *Grimes*. The case of *Chaplin v. Boys*[49] is often regarded as the source of the modern English law for foreign torts and its decision is thought to be generally satisfactory. It is my argument that not only is the result indefensible and one that does precisely what *Grimes* did not do (exposing the

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[46]In *O'Connor v. Wray*, [1930] S.C.R. 321, [930] 2 D.L.R. 899, the Supreme Court, in an appeal from the courts of Québec, had interpreted, with no reference to any evidence, a provision of the Ontario *Highway Traffic Act*, R.S.O. 1927, c. 251.

[47]The purposes of the "gratuitous passenger " rule are not obvious, but whether those purposes are to protect Ontario insurers from possibly fraudulent claims or some other concern, those purposes must be related in some way to what can only be an Ontario purpose. It is, of course, possible that a court could see the purpose of the Act as being forwarded in the context of *McLean v. Pettigrew*, but the possible justification for that result is not clear to me. See Linden, *Canadian Tort Law*, 3rd ed. (1982), pp. 613, 614, and, for example, the judgment of the New York Court of Appeals in *Babcock v. Jackson* (1963), 12 N.Y. 2d 473, 191 N.E. 2d 279, for an examination of the purpose of the relevant section of the Act.

[48]There are some other qualifications that I shall elaborate in my discussion of *Chaplin v. Boys* in the next paragraph.

[49][1971] A.C. 356, [1969] 2 All E.R. 1085, (H.L.)

> defendant to an unexpected risk of liability) but the House of Lords reaches its conclusion in an unsatisfactory way.[50]
>
> The facts of the case as they are given in the judgments in all the courts are well-known and I shall not repeat them here. The House of Lords and the Court of Appeal imposed liability on the defendant on a number of different grounds, but principally on two grounds:
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> (a) that the issue was one appropriate to be resolved by English law as the *lex fori*[51]; or
>
> (b) on the basis that both parties were English.
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> If we stop and ask what this latter basis has to do with the imposition of tort liability for a traffic accident in Malta, what answer might we expect? Consider some probable facts. Malta is a very small island, roads and streets are narrow

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[50]The judges in both the Court of Appeal, [1968] 2 Q.B. 1, [1968] 1 All E.R. 283, and in the House of Lords who refer to the American cases show that they did not understand any of the then recent cases. The judges in the House of Lords, for example, read cases like *Babcock v. Jackson supra*, note 45, as if the judgment of Fuld, C.J., used a "jurisdiction selecting" rule as the justification for the result. There is a very large difference between a theory of Conflicts based on jurisdiction selecting rules and one based on a process of choice between individual rules. The two approaches cannot co-exist, though it is sometimes suggested that they can. *Babcock v. Jackson*, for example, is inconsistent with the idea of the "proper law of the tort", a concept with which it is often confused.

[51]This aspect of the decision raises the theoretical issue of "characterization". The view that by regarding the issue as one of "remedy" and not "substance" no question of the justification of the entitlement of the plaintiff to the remedy or of the right of the defendant to protection from unexpected liability is relevant is hard to defend on any basis of justice or of any other "external" criterion. Lord Wilberforce (p. 393 (A.C.), p. 1105 (All E.R.)) suggests as much. He says:

> There certainly seems to be some artifice in regarding a man's right to recover damages for pain and suffering as a matter of procedure. To do so . . . goes well beyond the principle . . . that matters of assessment or quantification . . . are for the lex fori to determine.
>
> Yet, unless the claim can be classified as procedure, there seems no basis on the traditional approach for denying the application of Maltese law. I find the basis for so doing only in the reasons I have stated.

Those reasons were largely based on the fact that the parties were English, suing in an English court. I cannot deal more fully with my objections to the device of characterization or with the alternatives to it in this paper.

and distances are very short. Cars are severely limited in size and speed. I do not know if these facts have an effect on the frequency or severity of accidents, but it is obvious that they may. These circumstances and the Maltese law of tort liability are relevant to what the expectations of the defendant might have been.[52] For example, if insurance was not compulsory in Malta drivers could decide that insurance coverage against the risk of personal injury to others was optional or not worth the cost.[53] If it is unfair to expose the defendant who insures in the Québec context to liability to the Ontario standard, it is as potentially unfair to have exposed the defendant in *Chaplin v. Boys* to liability in an English court. There is no evidence to suggest that the plaintiff had any more reasonable an expectation than Ms Grimes or Mme Prefontaine and her children regarding the applicability of Ontario law that he would be protected to the English standard.

Lord Denning, M.R. in the Court of Appeal stated that "both vehicles are fully insured against liability for damages, whatever sum is awarded."[54] The dispute in the case was over the plaintiff's right to £2,250 damages for heads of claim denied under the law of Malta but compensable under the law of England. I do not know if the statement of Lord Denning would have been true if the claim had been for £22,500 or £225,000. The type of insurance coverage available would obviously determine this question. Is the policy one with a limit as is common in North America or one with no such limit as is common in the United Kingdom? The presence or absence of insurance is a slippery fact. Its presence may make the imposition of liability unobjectionable as Lord Denning seems to suggest, but that fact cannot always operate to justify the same conclusion. Conversely, the absence of insurance would not always justify a decision that the defendant should not be held liable. What is important is not that there is insurance but that the defendant not be exposed to a risk that he should not fairly have to run, perhaps by choosing to limit his insurance

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[52]The fact that the defendant was English does not settle the question of his liability or expectations any more than a tourist's nationality would settle her liability or expectations under the tort regimes of any province or the applicability of the provisions of the uniform *Insurance Acts* of Canada. The fact that the defendant was a British serviceman stationed in Malta—a fact that was used to demonstrate the tenuousness of his connection to Malta—may be relevant, but equally may not be. A member of the Canadian Armed Forces stationed in Québec would, I assume, be able to take advantage of the Québec insurance scheme even if he or she was from another province.

[53]It makes no sense to insure against a risk that one can easily cover out of one's own pocket—hence the popularity (among other reasons) of deductibility clauses.

[54]*op. cit.* p. 19 (Q.B.), p. 286 (All E.R.) The presence of insurance may make the result appear to be fair, but that fact is hardly a good defence of it.

coverage, or that the plaintiff not be given protection beyond that which he might reasonably have expected to have had.[55]

The judgments of Lords Hodson, Wilberforce and Pearson in the House of Lords suggest that the imposition of liability on a Maltese driver might not follow from their decisions. What justifiably distinguishes a Maltese driver from an English one? Nationality, citizenship or residence by themselves can have nothing to do with the justification for the imposition or not of tort liability for there is nothing in the law of torts that would indicate that such facts are relevant to liability. Distinctions based on those facts must be irrelevant. The fact that an English driver had or might have had full insurance coverage to the English standard cannot by itself be a plausible ground for the imposition of liability, just as a Maltese driver's decision to take out insurance cannot justify making him or her liable.

Far from being a satisfactory result, the decision in *Chaplin v. Boys* is, I believe, not only unfair but unprincipled: it does not deal with the facts that justify the result the court reached. The judgments do not, for example, deal with the arguments of Diplock J.A. in the Court of Appeal regarding the impropriety of using either the residence or nationality of the parties or the presence of insurance in the decision.[56] As a decision in the traditional context of *Phillips v. Eyre*, perhaps the decision should not be expected to be principled, but to suggest that the result is in any way justifiable on any tort basis, that it is fair or that it is proper for the issues as between two Englishmen in England should be sorted out with reference to English law is to carry the defence of the decision and the result beyond the point that any of those criteria can support.

The unfairness of the result and the irrelevance of the test adopted by the House of Lords may appear more clearly if an imaginary case were to be considered. Suppose that a British Columbia driver with insurance limits prudent in that province were to injure a resident of California who was crossing Georgia Street in Vancouver and be sued in California for the damages usually awarded in that state[57]. If we ignore the fact that the California court would apply neither *Phillips v. Eyre* nor *Chaplin v. Boys* and assume that California damages would be far higher than those usually awarded in Canada, how would traditional conflicts rules as applied in those judgments limit the liability now facing the B.C. driver? Isn't that driver, just like Mario Cloutier, entitled to have his expectations protected? Those expectations are not formed by the existence of something called "civil liability" in British Columbia, but by the whole context of the society as it relates to driving and the compensation for injuries caused

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[55]The objections that I have made to the result were clearly stated by Diplock, L.J. in the Court of Appeal, pp. 44-45, (Q.B.), p. 302 (All E.R.).

[56]*ibid.*

[57]The suggestion made in *Chaplin v. Boys* in the Court of Appeal by Lord Denning, p. 25 (Q. B.), p. 289, (All E.R.), that the Maltese parties would probably sue in Malta is irrelevant. As he admits, almost reluctantly, there is no reason why the plaintiff always would sue there.

> by traffic accidents. That context includes the type of insurance coverage available to cover the risks of traffic accidents and whether policies have limits or no limits. In the Canadian context, policy limits are chosen by what is prudent protection given the pattern of awards for tort damages in Canada. This pattern will be reflected in the cost of, for example, moving from the required provincial minimum coverage to policy limits of $500,000, $1,000,000 or more. If the cost of obtaining insurance above the minimum is small, one may assume that the risk of liability above that amount is very low. This pattern of planning is an aspect of what is fair to the defendant. It is also an aspect of what is fair to the California plaintiff who, after all, chose to come to British Columbia. Fairness to the insurer has a different aspect that I shall not now discuss.[58]
>
> I admit that the cases I have chosen as illustrations offer fairly simple solutions. That fact should not surprise us for fundamental ideas of fairness and of the reasonable expectations of those who drive can usually be easily applied and the necessary underlying facts readily imagined. I think that it is probable that any two party litigation is likely to offer a fairly simple solution. There is no need for legislation nor is there any justification for falling back on any kind of choice of law rule, whether it be the place of the accident or the residence of either party. Such rules cannot provide as much certainty as the approach of the Court of Appeal in *Grimes* or that I have offered.
>
> The facts of *Prefontaine* may appear to present an easy problem to the court, but that case is more complex than *Grimes*. A focus on the defendant and on his or her expectations provides a ready association with justice. When the defendant is from the "liability" state and the plaintiff is from the "no-liability" state, arguments based on the defendant's expectations are harder to sustain. It is easy to imagine the consternation faced by Marie or Mario Cloutier in being made liable to the Ontario standard when neither has insurance under the Québec scheme to meet the risk.[59] No Ontario driver who has insurance is as likely to be exposed to the same risk if he or she has to compensate a Québec plaintiff. I think that Griffiths J.A. may have noticed this difference in his reference to the expectations of the *parties*, rather than to those of the defendants. There is nothing unusual in discovering that considerations of justice can differ from case to case. Any focus on the reasonable expectations of anyone will have to deal with the fact that in some circumstances expectations, like reliance, sometimes do not exist or are very much weaker than in others. What is common to both *Grimes* and *Prefontaine* is that the judgments provide principled answers to the questions that the courts faced and that those principles

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[58]Fairness to the insurer may centre on the way in which losses for any given year are factored into the cost of doing business, the pattern of competitive pressures in the industry and the method of fixing premium levels. Such an inquiry would be very complex.

[59]I infer from the fact that the same counsel appeared in *Grimes* and in *Prefontaine*, where we know from the facts that there was insurance, that the Cloutiers probably had insurance. This fact, for it cannot be inevitable, does not weaken my argument. In *Grimes* the parties agreed to limit the plaintiff's damages to $36,000. What would have happened if damages had been ten times that amount?

> owe nothing to any ideas, theories or concepts that are not the stuff of "everyday judging".
>
> There are still more difficult cases. If the role of the parties' expectations in *Prefontaine* was attenuated so that arguments of justice were not as compelling as in *Grimes*, there will be situations where the parties' expectations are in conflict or where there is no obviously fair result. The situation that often illustrates this difficulty is one of vicarious liability. I shall very briefly sketch out the problem, using an example taken from the Restatement Second, Conflict of Laws[60] which happens to be close to a simple variation on the facts of a Supreme Court of Canada case[61]. For the sake of simplicity I shall use imaginary provinces to outline the facts that I want to examine. Suppose that in the province of Laurentia the owners of cars are vicariously liable for the torts of those driving the vehicle with the owner's permission and that in the province of Huronia the exposure of owners is more limited. Suppose now that a Huronia owner lends her car to a friend, but says as she hands over the keys, "Do not drive into Laurentia for I know that they make owners liable for what drivers do there and I do not have sufficient insurance to cover the risks of your making me liable". The friend disobeys the owner's instructions, drives in Laurentia and seriously injures a pedestrian, a resident of Laurentia. The Laurentian resident sues the Huronian owner. It does not matter where the action is brought for the analysis that follows.
>
> Both parties may justifiably claim the protection of "their" law. Both parties (whether they knew it or not) ran the risk that the driver might actually be driving without or beyond the scope of the permission granted and that a solvent defendant might not always be available. There is no obvious answer to the

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[60]§ 174 provides:

> The law selected by the application of the rule of § 145 determines whether one person is liable for the tort of another.

The Comment to that section discusses every readily imaginable variation on the facts except the one that I have put in the text immediately following. The examples chosen all justify liability except where liability is based on the rule—regarded by the Comment as anachronistic—that a husband is vicariously liable for the torts of his wife.

[61]*O'Connor v. Wray*, [1930] S.C.R. 321, [1930] 2 D.L.R. 899, (S.C.C.). The Court dismissed an action brought in Québec by an Ontario resident who had been injured by the person to whom the defendant owner had lent his car. The Court applied the first rule in *Phillips v. Eyre* to justify the result, though it also held that the Ontario statute did not apply to the facts so that there was, in fact, no liability under Ontario law. It is not completely clear that the Supreme Court saw itself as interpreting the Ontario legislation directly or as a Québec court applying Conflicts principles. In any event, the possibility of interpretation and direct application of the Ontario statute by the Supreme Court was not considered in *McLean v. Pettigrew*.

problem I have raised and there is certainly no simple one.[62] If there is no easy solution to this problem—just as there is no easy solution to an analogous problem in a wholly domestic setting—we surely cannot justify finding a spuriously simple solution by falling back on any of the traditional rules. We can only recognize that the case is difficult and deal with it as such. Just as we can see and appreciate the strength of the competing claims in this situation, we may have to acknowledge that the court of whatever province where the plaintiff chose to sue may be justified in making the decision to favour its own resident. Such a result is neither to be deplored nor avoided in all cases. If the two provinces may, under the *Constitution Act, 1867*, differ on the way in which they balance the claims of owners and pedestrians, why may not two courts as organs of the two provinces do so too?[63]

If my claim that the answer to all foreign tort claims lies in the usual careful judicial examination of the facts of the cases—as torts cases—and in the interpretation of the rules of the jurisdiction where the court is sitting, then I can make the further claim that the same analysis deals with all other problems in which the court is presented with geographically complex facts, whether those problems are those of the law of torts, contracts, marriage, trusts or succession. I obviously cannot demonstrate this claim in this paper. I can make here the less extreme claim that if choice of law rules do not work in torts, they do not work anywhere, and that anyone who would argue that choice of law rules do, in fact, work in any area, must show that they work in torts.

"Officious Intermeddling"

The claim that the Supreme Court of Canada could have "solved" the problem it faced in *McLean v. Pettigrew* by interpreting the Ontario *Highway Traffic Act* and that there may be justifiable grounds for courts, as there are for provincial legislatures, to make differing value choices for their societies leads directly to the final claim that I shall make for the judgment in *Grimes*. Suppose that an Ontario government, annoyed at the treatment of Ontario residents by the Régie, were to pass an act that made all residents of Québec who injured an Ontario resident in an accident in Québec liable for full common law damages to the Ontario resident.[64] Such legislation would be held to be a violation of the

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[62]It is odd that the Restatement does not deal with this fact situation in its discussion of its rule. Is this fact an implicit admission that the principle cannot work in that situation?

[63]I have raised this problem elsewhere in a special setting. Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985), 63 *Can. Bar Rev.* 271 at 316, ff. See also, Lindsay, "Automobile Negligence and Conflict of Laws" (1989-90), 11 *Advocates' Quarterly* 159, where the implications of the *Canadian Charter of Rights and Freedoms* in the rules for taking jurisdiction and serving the defendant *ex juris* and in choice of law are explored.

[64]Notice in this context the provisions of the uniform insurance acts, e.g., *Insurance Act*, R.S.B.C. 1979, c. 200, ss. 246, 252 and *Insurance Act*, R.S.O. 1980, c. 218, ss. 220, 226 imposing liability on the driver who comes into a province and there injures a resident of that

limits on provincial sovereignty under the *Constitution Act, 1867*, s. 92(13).[65] The statement that the application of Ontario law to make the defendants liable in *Grimes* would be "officious intermeddling" must, when expanded, have the same justification as an argument that the imaginary legislation of Ontario would be invalid. In other words, we can only give content to a word like "officious" in the context of *Grimes* by using standards that suggest limits to the power of a province to affect those who are residents of other provinces. The provisions of the *Insurance Acts*, for example, that I have mentioned[66] are a justifiable interference with the rights of residents of other provinces. Those acts make the "foreign" driver meet the standards of conduct and the limits of liability of the province where he or she drives. These provisions are justifiable on grounds that parallel the reasons that Morden J.A. gives to justify denying the plaintiff in *Grimes* a remedy; she did not expect to have her entitlement to compensation if she were injured by a Québec resident determined by Ontario law. Conversely, a Québec resident driving in Ontario cannot claim to be caught by unfair surprise at being held liable to compensate an Ontario resident whom she injures in an Ontario accident.[67]

The Paradigm Shift and Pandora's Box

I do not want there to be any doubt about the implications of what I claim to see in the decisions in *Grimes* and *Prefontaine*. My claim is that (i) the introduction of a test based on what the parties expected, (ii) limiting the application of Ontario law by reference to that test, and (iii) finding a solution in the ordinary process of interpretation displaces the whole choice of law apparatus. Not only does it displace the traditional Anglo-Canadian apparatus, it displaces all the American approaches, that of the First Restatement and that of the Second

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province. These provisions offer strong indirect support for both the result in *Grimes* and the argument that I have made for the proper scope of any provincial legislation like the Ontario *Highway Traffic Act*.

[65]See Hogg, *Constitutional Law of Canada*, 2nd ed. pp. 272 ff.

[66]*supra*, note 62.

[67]The obvious variations on these facts that have so exercised American courts are not relevant to the point that I want to make. I need only observe that of course there may be more difficult cases. When those cases arise a satisfactory resolution of the problems they pose will have to be developed.

> Restatement. It also displaces the developments of scholars like Currie[68] and Cavers[69] and all who have followed them.
>
> My point of departure from both traditional theory and more recent American theory is that I deny the validity of the claim that uniformity for its own sake is a defensible goal of any approach to the resolution of Conflicts problems. Traditional theory sees both *McLean v. Pettigrew* and *Grimes* as presenting the same facts and as requiring uniform treatment.[70] Morden J.A., in effect, denies that the goal of uniformity overrides the need to respect the demands of the underlying tort problem and he is content to justify the result in *McLean v. Pettigrew* and the contrary result, from the position of the rules of *Phillips v. Eyre*, in *Grimes*. *Prefontaine* is, of course, the illustration that uniformity is much more likely to be achieved by the usual judicial processes of interpretation and the consideration of competing values.
>
> The denial of the validity of the goal of uniformity in whatever form it comes is a direct result of the idea implicit in the notion that one province may "officiously intermeddle" in the affairs of another. This notion is, of course, at the heart of a federal system. Such a system can only function if each component part is simultaneously free to make certain value choices for itself and bound to respect the equal claim of each of the others to make its own value choices. When there are different value choices made by the component parts of a federation as in the schemes for compensation for traffic injuries and for compensation for dependants in Québec and Ontario it is inevitable that

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[68]The writings of both scholars are voluminous. Reference may be made to their collected works: Currie, *Selected Essays on the Conflict of Laws* (1963); Cavers, *The Choice of Law; Selected Essays, 1933-1983* (1985). The conclusion, for example, that both *McLean v. Pettigrew* and *Grimes v. Cloutier* are "false conflicts" takes us no where so long as we have no principled method for dealing with "true conflicts". Similarly there can be no agreement over what are "principled preferences" or how one might be applied in a particular case.

[69]The seminal article by Cavers, "A Critique of the Choice of Law Problem" (1933) 47 *Harv. L. Rev.* 173, contains several statements that support my claim. Cavers' later writings suggest that either he did not see the full implications of what he had said or that he backed away from them. In other words, I reject the implicit assumption underlying his "Principles of Preference" in *The Choice of Law Process*, (1965) that the same result should be reached wherever the case is litigated. Cavers is at pains in this book to "explain" his earlier statements.

[70]Again I have to leave out of account the fact that the application of *McLean v. Pettigrew* means that there will not be a uniform solution to two actions based on identical facts, one brought in one province and one in another. This kind of fundamental incoherence between the actual results of the cases and the stated goal of the theory has never bothered those who support the traditional approach. Dean Falconbridge, for example, could simultaneously point out the incoherence of the result in that case and the risk it created in exposing an Ontario driver to liability to his or her guest in an action brought in Québec, and still support the full panoply of traditional Conflicts rules.

solutions in Conflicts cases, that is cases with geographically complex facts, may differ. Why should we expect for a moment that they would not? If these problems are difficult—though as I have suggested neither *McLean v. Pettigrew* nor *Grimes* is a difficult problem to resolve—why should we expect that a satisfactory solution will be easy to find? Why should Conflicts problems be any different from those in any other area of the law?

These questions could go on for a long time and this paper is not the place for such an analysis. There is, however, one special class of questions that needs to be mentioned. Morden J.A. suggests that a solution to the problem the court faced might lie in something like the *Foreign Torts Act*[71] or other legislation. Why should Conflicts problems elicit that response when the ordinary problems of tort and contract liability generally do not? Why should it be anything but the most obvious and simple solution to sort out the fundamental question of any torts problem—who shall bear the risk of loss in the events that have occurred when one of the parties has been at "fault"?—by using a risk allocation device that reflects the concerns of fairness of both jurisdictions in such a situation? The approach of Griffiths J.A. in *Prefontaine* is an equally simple and natural response to the problem before the court: does the *Family Law Reform Act* give these plaintiffs a right to compensation from the defendants? There is no need to amend that act[72] to justify the result.

We shall suffer the consequences of the opening of Pandora's Box if the decision of the Court of Appeal in *Grimes* is seen—as, sadly, it was in *Prefontaine*—as just another in the line of cases in Canadian courts since the introduction of the Québec no-fault scheme that have, like *Chaplin v. Boys*, done little but manipulate the traditional rules to reach results that are occasionally defensible, but which are as likely to be unjustified applications of common law notions of tort liability to those who had no expectation of their being subject to such risks. The tragedy of traditional conflicts analysis is not that wrong results are always or even frequently reached; the tragedy lies in the contribution of that analysis to two results:

(a) the decisions are both unprincipled and "unreckonable"; one can never know when the courts will decide to develop a new gloss on an old rule to avoid a result that is regarded as undesirable; and

(b) the standards that the courts use to decide when a result is or is not desirable are not openly discussed and to the extent that we cannot easily discover what facts actually motivated the courts in reaching their decisions, counsel cannot know what facts are relevant to the courts' decisions.

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[71]See, *supra*, note 36.

[72]The relevant act is, of course, the *Family Law Act, 1986*, S. O. 1986, c. 4. My statement remains valid.

> The principal responsibility of those who defend the traditional rules is to show how those rules can achieve the values that the law must forward, the values of certainty and predictability, faithfulness to the constitutional division of powers, and what is most important, the creation and maintenance of a sense that fairness to the parties is fundamentally important. If traditional doctrine cannot be shown to be consistent with fairness and with justice then it must be discarded and a new basis for analysis developed. Perhaps it is not too much to hope that the crucial first step in this direction has been taken by the Ontario Court of Appeal.

NOTE

The British Columbia Court of Appeal in *Tolofson v. Jensen*, Vol. I, page 167, discussed *Grimes v. Cloutier* and *McLean v. Pettigrew* in dealing with an action arising out of a motor vehicle accident in Saskatchewan. *Machado v. Fontes* and *McLean v. Pettigrew* are stated in the headnote to have been applied, while *Grimes* was distinguished. The judgment is an illustration of all that is wrong with traditional conflicts rules. First, it is hard to explain or understand the reverence—no other word seems close to expressing the judicial attitude—paid to *McLean v. Pettigrew*. There are other cases of equal if not superior standing that cannot be reconciled with it: *Walpole v. Canadian Northern Railway*, [1923] A.C. 113, [1922] 3 W.W.R. 900, 70 D.L.R. 201, and *McMillan v. Canadian Northern Railway*, [1923] A.C. 120, [1922] 3 W.W.R. 904, 70 D.L.R. 229. *Machado v. Fontes* has been overruled by the House of Lords and that fact might have contributed to the court's readiness to consider other possibilities. There were two defendants who were related to the plaintiff in very different ways. One defendant was the plaintiff's father, the driver of the car in which he was a passenger. The other was a Saskatchewan resident who had collided with the Tolofson car.

It does not seem essential that the same rules must apply to both defendants. *McLean v. Pettigrew* offers a plausible basis for treating the claim of the plaintiff against his father and the father's argument that, under Saskatchewan law, he would only be liable to a gratuitous passenger if the could prove wilful or wanton misconduct. The argument of the Saskatchewan defendant was that the Saskatchewan limitation period for motor vehicle tort actions had run. We have the same problem with the father's defense that we have with the purpose of the Ontario statute considered in *McLean v. Pettigrew*. It seems to be an irrational response to any conceivable problem except the insurers' desire to discourage as many plaintiffs as possible. As a result it is hard to understand what scope it should be given. If the plaintiff can prove that his father was negligent, it may well be that the father's insurer (Insurance Corporation of British Columbia) should compensate the son.

As regards the action by the Saskatchewan defendant, we have other problems. We have mentioned already (in connection with *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591, [1975] 1 All E.R. 810, (Vol. I, page 343) and the recognition of foreign judgments) the curious mental blockages and judicial gymnastics that appear whenever the courts deal with limitation periods. The conventional statement is that periods of limitation are matters of procedure and, therefore, governed by the *lex fori*. If, however, a limitation period is an expression (except where the periods are ridiculously short and designed solely to trap the plaintiff who would have the temerity even to think of suing various governmental bodies) of the need to protect defendants from stale and unfair claims, it becomes much harder to accept that the Saskatchewan period should be ignored in an action brought in B.C. The plaintiff's claim against this defendant would seem to be much closer to that of the plaintiff against the Québec defendant in *Grimes*. *Tolofson* represents one of another in the long line of conflicts cases where the court failed to deal with any of the issues that had to be decided.

Chapter 13

Towards a Principled Approach

> It is said that "taught law is tough law"; it is tough at least among the teachers. They draft a rule and rehearse it so frequently that they believe it to have divine authority. At times it continues to be rehearsed and taught long after the living law of decision and application has taken another channel. *Corbin on Contracts*, Vol 4. § 836, p. 355.

INTRODUCTION

The analysis of this Part has been concerned to show that the traditional choice of law rules as developed by both the courts and academics are not just wrong in point of detail, but fundamentally wrong. It is not overstating the strength of my criticism to say that the rules are contrary to all the values that the law stands for. They cannot operate fairly and for a court to manipulate them to make sense of the problem before it is to deny the parties any chance to participate fully in the process of adjudication. Tinkering with the rules only leads either to even more bizarre results (e.g., *McElroy v. McAllister*), or to a fundamental inconsistency in the theoretical approach (e.g., the confused discussion of Castel and *Dicey & Morris* on *Bondholders* and "false conflicts). Any solution must, therefore, start from the very beginning.

We can get some idea of what is involved from an examination of the development of American theories and ideas. The discussion that follows is brief, perhaps even to the extent of being misleading. The bare bones of the development outlined here will be supplemented by the discussion in class. The cases that are reproduced are, once again, more for ease of future reference than for detailed study before class. Their importance and role in the development of the modern American ideas will be briefly indicated in these notes.

You will remember that one of the most potent forces that have created the modern American law was the Realist Movement that dominated much American thinking in the early years of this century. The principal contribution of that movement was the demonstration of the fundamental inadequacy of conceptual or formalist thinking in the law. Formalism or conceptualism was an approach to legal problems characterized by a belief that the law was a logical enterprise and that the business of judging was the deduction from certain concepts—consideration in contracts, the corporation in corporate law, etc.—of the appropriate rule to decide the case before the court. What the law should be, or what values it should seek to forward were *formally* irrelevant. You will have seen many examples of that kind of reasoning in all of your other courses. It has, of course, been the dominant theoretical perspective in conflicts.

It was obvious to any one that in spite of the acceptance of formalism, the courts were always prepared to manipulate doctrine or the concepts of the law to reach results that were consistent with their perception of the values that should be considered. You have only to go back over

the cases in this course, or any other course, to see clear evidence of that fact. The realists forced people to look behind the formal rules to what was actually going on, and in so doing, demonstrated the inadequacy of the traditional approach.

Though we call formalism the "traditional approach", the rise of formalism can be traced to a convergence of several ideas about the middle of the nineteenth century. One was positivism, particularly that of the Benthamite or Austinian variety, another was the perception of the dominance of Parliament, and the consequent subservience of the courts. (This latter idea is associated with the views of Dicey on the "Sovereignty of Parliament".) Another fact was the rise of the legal academic, and his (not then, her) desire to play a role in the development of the common law by the courts. This role was seen as being the development of the "principles of the common law", and found expression in works like Pollock's textbook on contracts, Salmond's book on Jurisprudence, and of course, Dicey's work on Conflicts. More general philosophical ideas like moral scepticism ("Who am I to say what is the proper value to be forwarded in this case: I, as judge, am merely the inert conduit by which you are zapped by the rules of the common law". This statement is a paraphrase of the judgment of the House of Lords in *Foakes v. Beer* (1884), 9 App. Cas. 605) also played a part in supporting the belief that the judge or academic commentator had no duty to say what the law should be, and why. Another expression of the same attitude was the constant glorification—a word that is justifiably used in this context—of the "genius of the common law", and its capacity to produce a "scientific" model of the law. (The nineteenth century faith in science, and the familiarity of many educated people, or their belief that they were familiar with it, also played a part in creating the dominance of formalism.)

The contribution of the Realists, Llewellyn, Cohen, Frank, and others was in the beginning almost entirely negative; they were concerned to attack conceptualism and formalism wherever they found it. Some of their writing is wonderfully vituperative, see e.g., Cohen, "Transcendental Nonsense and the Functional Approach". The negative aspect of their contribution almost exactly parallels that of the Critical Legal Studies people today.

Once the structure of formalism had been demolished, it became necessary to rebuild something to take the place of the old theory. This rebuilding was undertaken by writers with whom you are already familiar: Fuller, Corbin, Prosser and Scott, to mention only four of the greatest. These writers tried to take the law of contracts, for example, out of the formalist tradition by developing rules or principles which could be based on the acknowledgement of the relevance of the values that the law had to respect. The famous article by Fuller & Perdue "The Reliance Interest in Contract Damages" (1936), 46 *Yale L. J.* 52, 373, is firmly in this tradition.

The last dying gasp of the formalist tradition in America was the publication in the early 1930s of the *Restatement of the Law* by the American Law Institute. The Restatement of Contracts was, for example, firmly in the formalist tradition as exemplified by Williston, who was the Reporter. Corbin was his assistant and he managed to plant a number of "time bombs" in the Restatement, some of which went off, e.g., § 90, dealing with the protection of reliance. (The doctrine of promissory estoppel developed after the *Hightrees* case was a response to the same

concerns as led to § 90.) The formalist tradition was the dominant force behind the creation of the Restatement of Conflicts. The Reporter was Joseph Henry Beale, who was deeply committed to the formalist tradition and who developed rules very much along the lines of those then in Dicey's work and now still in *Dicey & Morris*.

SOURCES AND EXAMPLES

The person who played the same role in the development of a new approach to Conflicts as Fuller and Corbin played in the development of contracts was David F. Cavers. His major article was "A Critique of the Choice of Law Problem" (1933), 47 *Harv. L. Rev.* 173. In this article, Cavers simply asked why conflicts cases could not be decided like any other cases. The most famous sentence in this article is: (p. 193)

> The choice of that law [i.e., the rule for decision in any case of geographically complex facts] would not be the result of the automatic operation of a rule or principle of selection but a search for a just decision in the principal case.

Earlier in the article he had said: (pp. 187, 188)

> Not infrequently, in the administration of domestic law, there arise situations in which two lines of authority pointing in opposite directions, seem open to a court. Those situations may at times be clarified by the precipitant of judicial intuition, but more often they bring to the fore the manifestations of judicial intellection. They demand a penetrating analysis of the controversy and the transaction out of which it arose, an exacting inquiry into and appraisal of the competing rules, a deliberate weighing of the equities. In such a case there may be consequent on the decision the growth of one rule, the stunting of another. But regardless of whether this be so, there is very definitely a heightening of the court's responsibility to the parties. The decision cannot be attributed to the wisdom of the judges of times past, for it must disregard the wisdom of judges equally dead and equally wise. Compare the situation which a novel conflicts case presents. Two rules of law are invoked; usually the selection of either will determine the case in favour of the party urging its choice. That selection will probably not contribute materially to the development of the rule so chosen. In that sense the case differs from its domestic analogue. From the standpoint of the parties, however, is there not a comparable responsibility upon the court? Their transaction, because of its interstate character, has placed them in a position where each may, with some justification, urge the protection of a recognized rule of law. The choice between these rules, even as a precedent for future choices, may not be of great social significance. But does this discharge the court from a painstaking examination of the same factors whose materiality would be admitted were the case a purely local one, together with those additional factors which the interstate character of the transaction raises into prominence?

Cavers did not immediately develop these ideas. He went into other areas, then the war intervened and he temporarily left teaching. After the war, there arose a growing disenchantment with the traditional rules of conflicts. Some cases openly manipulated rules found to be unsatisfactory. The beginning of a new academic interest in the problem of the choice of law was led by Brainerd Currie.

Currie suggested that the central problem in conflicts was the notion of "governmental interests". His theory is outlined in the article which follows. The general idea that Currie outlined here became known as "interest analysis". Its principal features can be seen from what Currie wrote in 1959.

Currie, "Notes and Methods and Objectives in the Conflict of Laws"
[1959] Duke L. J. 171. (Reprinted, Currie,
Selected Essays on the Conflict of Laws, p. 177.)

In making public some misgivings concerning our method of handling problems in the conflict of laws, I have heretofore been prudent enough to confine the discussion, in the main, to specific cases. The conclusions reached do, however, have broader implications, and on this occasion I propose to explore these to some extent although the more circumspect course would be to abstain from generalization until there has been adequate analysis of many more specific cases. My principal reason for venturing on this hazardous enterprise in that it provides a convenient way of pointing out problems which require further analysis.

Why does a court ever refer to foreign law? It may do so for various reason, some of which have nothing whatever to do with conflict of laws.

Three residents of Chicago, on learning that their ancestor in a distant state has died, agree to dispose of the property in the estate and divide the proceeds on the assumption that they inherit equal shares. When one of them later sues the others for restitution in an Illinois court, on the ground that he was, in fact, entitled to a half rather than a third of the estate, there is no question of conflict of laws. The Illinois law of restitution applies. It is necessary, however, for the Illinois court to refer to foreign law in order to determine that a mistake was made.

At the other extreme, a woman residing in Massachusetts contracts with a merchant in Maine to guarantee a line of credit to her husband, the law of one of the states disabling married women to make such contracts, the other having emancipated them. This may present the central problem of conflict of laws (to call it, as I am tempted to do, the "primordial" problem might be historically unsound). The policies of the two states are different, and their interests may be in conflict. The court in which the action is tried will refer to foreign law, if at all, for the purpose of finding the *rule of decision.*

Between these extremes there are cases which are certainly conflict-of-laws cases, in the sense that they are treated in all the books on the subject; but in them, when the court refers to foreign law it is for a purpose other than that of finding the rule of decision. A proceeding is brought in New York for workmen's compensation against a New York employer on account of the death of a New York employee. A question is raised as to the plaintiff's status as a widow. Although the couple had lived together as man and wife in New York for years, it develops that they were married in Italy, where they lived at the time. The court may refer to Italian law; but if so, it will be for a purpose other than that of finding a rule of decision. That is furnished by the New York

> first taking a position consistent with a rather rigid interpretation of its policy, denying effect to a foreign contract providing for somewhat higher interest rates than were permitted by local law, Nebraska reversed itself and conceded validity to such contracts where the law of the foreign state was "similar in principle" to the Nebraska small-loan act. The policy of Nebraska was not to protect is residents against any exaction of interest in excess of a particular rate, but to protect them against exactions in excess of a reasonable range of rates, based upon the common principle underlying such acts. This sensible approach to the delineation of policy could find wide application, especially to laws relating to formalities. It is, in fact, this kind of thinking which supports such legislation as section seven of the Model Execution of Wills Act. This is not so much a rule of alternative reference to the law of the state of execution, or of domicile, as it is a recognition that the policies of all the states are substantially the same and may be fulfilled by compliance with any—not just a particular one—of the formal requirements. Similar analysis may be expected to yield satisfactory results in the handling of the problem of consideration in the conflict of laws concerning contracts.
>
> I have been told that I give insufficient recognition to governmental policies other than those which are expressed in specific statutes and rules: the policy of promoting a general legal order, that of fostering amicable relations with other states, that of vindicating reasonable expectations, and so on. If this is so, it is not, I hope, because of a provincial lack of appreciation of the worth of those ideals, but because of a felt necessity to emphasize the obstacles which the present systems interposes to any intelligent approach to the problem. Let us first clear away the apparatus which creates false problems and obscures the nature of the real ones. Only then can we effectively set about ameliorating the ills which arise from a diversity of laws by bringing to bear all the resources of jurisprudence, politics, and humanism—each in its appropriate way.

NOTES

1. "Interest analysis", as Currie's method was referred to, suggests fairly easy answers to the problem of *Bondholders v. Manville*, the so-called "false conflict". Notice that Currie does not refer to a governing law. He refers instead to individual rules or laws in conflicts and their purposes. The first stage of Currie's analysis is that the courts should "inquire into" the policies expressed in the respective laws and the circumstances employing "the ordinary processes of construction and interpretation". (Cavers, (1970) 3 *Recueil des Cours*, 146-48, in an article explaining Currie to Europeans.) The next stage is that if only one state has an interest in the application of its policy the relevant law of that state should be applied. So far so good. Such an approach would solve many of the problems we have met. The next stage is that if the two states' interests appear in conflict an inquiry should be made to see whether a "moderate and restrained interpretation" of one policy or interest of one state or the other would avoid a conflict. We have seen examples of this restraint: the dissent in *Lilienthal v. Kaufman*, *Grimes v. Cloutier*, *Prefontaine v. Frizzle* and, perhaps, the decision of the B.C. Court of Appeal in *Block Bros. v. Mollard*. Such an analysis might

provide an answer to cases like *Chaplin v. Boys* and *McLean v. Pettigrew* (if litigated in Ontario) and, possibly *O'Connor v. Wray*.

2. Notice, however, Currie's curious limitation on the power of the court to consider the strength of the competing rules: he says that the Supreme Court has decided that "weighing" competing state policies in not a judicial function.

3. Do you think that what might be meant be "weighing" in the context of a constitutional case is the same process that would be involved in a "conflicts" case? Remember what Cavers said about the decision making process in a case of geographical complexity.

4. Currie's writing did not have much of an impact until the decision of the New York court of Appeals in the following case:

Babcock v. Jackson
(1963), 12 N.Y.2d 473; 191 N.E.2d 279
Court of Appeals of New York

FULD J. — On Friday, September 16, 1960, Miss Georgia Babcock and her friends, Mr. and Mrs. William Jackson, all residents of Rochester, left that city in Mr. Jackson's automobile, Miss Babcock as guest, for a week-end trip to Canada. Some hours later, as Mr. Jackson was driving in the Province of Ontario, he apparently lost control of the car; it went off the highway into an adjacent stone wall, and Miss Babcock was seriously injured. Upon her return to this State, she brought the present action against William Jackson, alleging negligence on his part in operating his automobile.

At the time of the accident, there was in force in Ontario a statute providing that "the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in . . . the motor vehicle" (*Highway Traffic Act* R.S.O. 1960, c. 172, s. 105(2)). Even though no such bar is recognized under this State's substantive law of torts . . . the defendant moved to dismiss the complaint on the ground that the law of the place where the accident occurred governs and that Ontario's guest statute bars recovery. The court at Special Term, agreeing with the defendant, granted the motion and the Appellate Division, over a strong dissent by Justice Halpern, affirmed the judgment of dismissal without opinion.

The question presented is simply drawn. Shall the law of the place of the tort[1] invariably govern the availability of relief for the tort or shall the applicable

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[1]In this case, as in nearly all such cases, the conduct causing injury and the injury itself occurred in the same jurisdiction. The phrase "place of the tort," as distinguished from "place of wrong" and "place of injury," is used herein to designate the place where both the wrong and the injury took place.

> In my view there is no overriding consideration of public policy which justifies or directs this change in the established rule or renders necessary or advisable the confusion which such a change will introduce.

NOTES

1. You will remember that *Babcock v. Jackson* was referred to in Lord Wilberforce's judgment in *Chaplin v. Boys* (Vol. I, pp. 120 at 126, 127). Do you see now that Lord Wilberforce misunderstood the significance of that decision in the context of the traditional rules? *Babcock v. Jackson* is *not* in that context: it is based on quite a different theory, one that must be regarded as either rejecting the traditional theory or being entirely inconsistent with it.

2. *Babcock v. Jackson* unleashed a controversy that was truly awesome. There were symposia, whole journal numbers devoted to discussions of the case. Every academic claimed that it supported his theory. For the next ten years the development in the American cases was an incredible outpouring of scholarly judgments, punctuated here and there by the cries of the traditionalists as they looked on what had happened to the law as they thought they had known it. Each judgment provoked its academic response, and the judges explicitly built on the views of the academics. The judges became expert at the development of interest analysis.

3. There is room for debate over whether *Babcock* was decided on the basis of a Currie-style interest analysis or whether the judgment in that case was mainly a matter of contact counting. However, in a case decided six years after *Babcock* the New York Court of Appeals clearly adopted a full-blown Currie approach. In *Tooker v. Lopez* (1969), 249 N.E. 2d 394, Catherina Tooker and Marcia Lopez were both New York domiciliaries who were in attendance at the University of Michigan. They left Ann Arbor on a weekend trip to Detroit in a car owned by Lopez's father, who lived in New York and registered and insured his car there. Both Tooker and Lopez were killed in a one-car accident and the former's estate brought a wrongful death action in New York. Michigan had a guest passenger statute which permitted suit only if there was gross negligence, however the New York court concluded that despite the fact that the automobile trip began and was to end in Michigan, that state had absolutely no interest in the application of its law to this action. *Tooker v. Lopez* is discussed in the case that follows these notes.

4. Other state courts adopted Currie's interest analysis, though they continued to experiment with a variety of ways of resolving true conflicts. In *Bernhard v. Harrah's Club* (1976), 546 P. 2d 719, the California Supreme Court dealt with a true conflict involving choice of law in tort. Two Californians had crossed into Nevada to drink at the defendant's bar. They left in an intoxicated

state, drove back into California and there negligently injured the plaintiff. The plaintiff then brought an action in California against the Nevada tavern owner, relying on California law which imposed liability on tavern owners who continue to serve customers who are obviously drunk. Nevada did not impose civil liability on the tavern owner in these circumstances, though an owner might be criminally liable. In holding that California law applied, Sullivan J. noted that the case

> involves a California resident (plaintiff) injured in this state by intoxicated drivers and a Nevada resident tavern keeper (defendant) which served alcoholic beverages to them in Nevada, it is clear that each state has an interest in its respective law of liability or non-liability. . .
>
> Once this preliminary analysis has identified a true conflict of the governmental interests involved as applied to the parties under the particular circumstances of the case, the "comparative impairment" approach to the resolution of such conflict seeks to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state. This analysis proceeds on the principle that true conflicts should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied. Exponents of this process emphasize that it is very different from a weighing process. . . .
>
> Defendant by the course of its chosen commercial practice has put itself at the heart of California's regulatory interest.namely to prevent tavern keepers from selling alcoholic beverages to obviously intoxicated persons who are likely to act in California in an intoxicated state. It seems clear that California cannot reasonably effectuate its policy if it does not extend its regulation to include out-of-state tavern keepers such as the defendant who regularly and purposely sell intoxicating beverages to California residents in places and under conditions in which it is reasonably certain that these residents will return to California and act therein in an intoxicated state. California's interest would be very significantly impaired if its policy were not applied to the defendant.
>
> Since the act of selling alcoholic beverages to obviously intoxicated persons is already proscribed in Nevada, the application of California's rule of civil liability would not impose an entirely new duty requiring the ability to distinguish between California residents and other patrons. Rather the imposition of such liability involves an increased economic exposure, which, at least for businesses which actively solicit extensive California patronage, is a foreseeable and coverable business expense. Moreover, Nevada's interest in protecting its tavern keepers from civil liability of a boundless and unrestricted nature will not be significantly impaired when as in the instant case liability is imposed only on those tavern keepers who actively solicit California business

5. Many of the significant choice of law cases occurred in New York, and the New York Court of Appeals was in the forefront of the "Revolution" as it came to be called. Fuld J. had by now become Fuld C.J. and he dominated that court. Although the New York Court of Appeals continues to claim that

takes an interest analysis approach to choice of law (see, e.g., *Schultz v. Boy Scouts of America Inc.* (1985), 480 N.E. 2d 679, 684) it has in fact retreated into a rule oriented version of Currie's method and the result is, in the end, curiously unsatisfactory. The retreat started in the next case.

Neumeier v. Kuehner
(1972), 31 N.Y.2d 121; 286 N.E.2d 454; 335 N.Y.S.2d 64
Court of Appeals of New York

FULD C.J. A domiciliary of Ontario, Canada, was killed when the automobile in which he was riding, owned and driven by a New York resident, collided with a train in Ontario. That jurisdiction has a guest statute, and the primary question posed by this appeal is whether in this action brought by the Ontario passenger's estate, Ontario law should be applied and the New York defendant permitted to rely on its guest statute as a defense.

The facts are quickly told. On May 7, 1969, Arthur Kuehner, the defendant's intestate, a resident of Buffalo, drove his automobile from that city to Fort Erie in the Province of Ontario, Canada, where he picked up Amie Neumeier, who lived in that town with his wife and their children. Their trip was to take them to Long Beach, also in Ontario, and back again to Neumeier's home in Fort Erie. However, at a railroad crossing in the Town of Sherkston—on the way to Long Beach—the auto was struck by a train of the defendant Canadian National Railway Company. Both Kuehner and his guest-passenger were instantly killed.

Neumeier's wife and administratrix, a citizen of Canada and a domiciliary of Ontario, thereupon commenced this wrongful death action in New York against both Kuehner's estate and the Canadian National Railway Company. The defendant estate pleaded, as an affirmative defense, the Ontario guest statute and the defendant railway also interposed defenses in reliance upon it. In substance, the statute provides that the owner or driver of a motor vehicle is not liable for damages resulting from injury to, or the death of, a guest-passenger unless he was guilty of gross negligence (*Highway Traffic Act* R.S.O. 1960, c. 172, s. 105(2)). It is worth noting, at this point, that, although our court originally considered that the sole purpose of the Ontario statute was to protect Ontario defendants and their insurers against collusive claims (see *Babcock v. Jackson*) "Further research . . . has revealed the distinct possibility that one purpose, and perhaps the only purpose, of the statute was to protect owners and drivers against suits by ungrateful guests." (Reese, "Choice of Law", (1971), 71 *Col. L. Rev.* 548, 558; see Trautman, "Two Views on *Kell v. Henderson: A Comment*", (1967), 67 *Col. L. Rev.* 465, 469.)

The plaintiff, asserting that the Ontario statute "is not available . . . in the present action", moved . . . to dismiss the affirmative defenses pleaded. The court at Special Term, holding the guest statute applicable, denied the motions . . . but, on appeal, a closely divided Appellate Division reversed and directed dismissal of the defenses . . . It was the court's belief that this result was dictated by *Tooker v. Lopez* (24 N.Y. 2d 569, [249 N.E. 2d 394, (1969)]).

"contact", however, necessarily started with the court's preference for the local rule and a belief in its greater justice.

There is a difference of fundamental character between justifying a departure from *lex loci delictus* because the court will not, as a matter of policy, permit a New York owner of a car licensed and insured in New York to escape a liability that would be imposed on him here; and a departure based on the fact a New York resident makes the claim for injury. The first ground of departure is justifiable as sound policy; the second is justifiable only if one is willing to treat the rights of a stranger permitted to sue in New York differently from the way a resident is treated. Neither because of "interest" nor "contact" nor any other defensible ground is it proper to say in a court of law that the rights of one man whose suit is accepted shall be adjudged differently on the merits on the basis of where he happens to live.

This crunch in the rule announced in *Babcock* was inevitable as it worked its way into the practice. And the difficulty was recognized in *Tooker*. Although *Tooker*, unlike the present case, involved a New York plaintiff and thus was similar to Babcock and the cases which had followed *Babcock*, the opinion of the court laid it down that the New York owner of a car insured in New York would not be permitted to escape liability through the guest statute of Michigan and that this was the main ground of decision. The court in *Tooker* said (p. 575): "This purpose [of a statute of another jurisdiction establishing higher standards for the recovery of guests in vehicles] can never be vindicated when the insurer is a New York carrier and the defendant is sued in the courts of this State. Under such circumstances, the jurisdiction enacting such a guest statute has absolutely no interest in the application of its law."

. . .

What the court is deciding today is that although it will prevent a New York car owner from asserting the defense of a protective foreign statute when a New York resident in whose rights it has an "interest" sues; it has no such "interest" when it accepts the suit in New York of a nonresident. This is an inadmissible distinction.

NOTES

1. *Neumeier v. Kuehner* is sometimes referred to as an "unprovided for" case or as a "no-conflict" case, as opposed to a "true conflict" or "false conflict" case. We have briefly explored these terms earlier. As an "unprovided-for-case" the court sees that the purpose of neither the New York rule nor the Ontario rule would be further by any decision it might make. Ontario does not seek to protect this defendant and his insurer, and New York is not concerned to protect this plaintiff by an award of damages. Given this situation, what should the court do?

2. *Neumeier v. Kuehner* was seen by some as a defeat for Currie's interest analysis: where are the Emperor's clothes when there are no governmental interests that bear on the case? Perhaps as a result or simply in

despair, there is certainly a "counter-revolution" among American scholars. We do not have time to go into this movement here. Its principal features are:

(a) The ascription of governmental interests can amount to nothing more than the beliefs of academics or judges about how far certain policies ought to reach: Brilmayer, "Interest Analysis and the Myth of Legislative Intent" (1980), 78 *Mich. L. Rev.* 392.

(b) Even if we can determine the domestic policy underlying a rule, that fact tells us nothing about its proper spatial application: Juenger, "Conflict of Laws: A Critique of Interest Analysis" (1984), 32 *Am. J. Comp. L.* 1.

(c) Statutory rules are the product of compromise and have no discernible purpose: Juenger, *op. cit.*

(d) Interest is too narrow in that it fails to recognize that choice of law cases require a consideration of *multi-state* interests: von Mehren, "Book Review" (1964) 17 *J. Legal Ed.* 91.

3. These criticisms (and others) were discussed and responded to by Herma Hill Kay in *A Defence of Currie's Governmental Interest Analysis*, Vol 215, *Receuil des Cours* (Academy of International Law, 1989).

4. The "rules" proposed by Fuld C.J. are an example of the direction that some modern American conflicts scholars are taking. They have seen that interest analysis has not provided any answer to the problems that the courts must deal with. Similarly the goal behind both Restatement, First and Restatement, Second, the goal of ensuring that there would be uniform decisions reached in all courts in which the dispute might be litigated is unlikely to be achievable. (The crucial provisions of the Restatement, Second are set out earlier, *supra*, p. ?.) The result of these perceptions has been a retreat to rules which are, at best, merely variations of the old, jurisdiction selecting rules of conflicts. There is nothing to suggest that such a retreat would avoid any of the problems which led to the original difficulties with the traditional rules. What is wrong with the analysis of the Restatement, Second, and all other American writers is that they see for a role for conflicts rules that is simply one that cannot be performed by rules of any type. No sooner had Fuld propounded his "rules" than they were shown to be unworkable, so that particular development was aborted.

5. What is, in our opinion, wrong with all the American approaches is the belief that the rules of Conflicts are intended to ensure that decisions will be the same regardless of where the plaintiff chooses to sue. The vice of forum-shopping is seen as so serious that a fundamentally flawed and anachronistic

method of reasoning is perpetuated. This need justifies the retention of something called the "Conflict of Laws", but the more we look at it, the less there seems to be there.

6. The successors to Cavers, and Cavers himself, made some important contributions. Jurisdiction selecting rules of the *Dicey & Morris* type have been abandoned, and the rules are at least capable of identifying the hard cases, and of differentiating them from the easy cases. All the American approaches, for example, agree on the resolution of false conflicts—those are the easy cases. It is obvious that no method of analysis and no theory of conflicts can hope to achieve uniformity in the case of true conflicts.

7. We shall have to leave the American approach and develop something for ourselves if we are going to find any kind of principled basis for the decision of conflicts cases. A principled basis must be one that is faithful to the need for every decision to reflect what we regard as the demands of rationality, and the simple fact that there are different rules in force in the different provinces of Canada, just as there are among the states in the United States, or between the countries of the world.

Chapter 14

The Constitutional Component

In *Moran v. Pyle National (Canada) Ltd.* (Vol. I, p. 269) you will remember that Dickson J., speaking for the Court, in dealing with the issue whether the tort had been committed in Saskatchewan said:

> Cheshire . . . has suggested . . . that it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties. Applying this test to a case of careless manufacture, the following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. This rule recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.

We have suggested that the test outlined by Dickson J. here and elaborated in *De Savoye v. Morguard Investments Ltd.* has established a Canadian test for both jurisdiction and for the recognition and enforcement of foreign judgments. That test focused on two factors: the fairness of the assertion of jurisdiction over the defendant and the nature of the relation ("contacts") between the defendant, the cause of action or the subject matter of the dispute and the jurisdiction that is asserting jurisdiction. We had briefly explored the notion that there might be constitutional limits on the power of a province to assert a jurisdiction that, shortly put, was excessive under some standard that may be developed.

We turn now to the development of an equivalent test for choice of law. We can set the stage by considering an American case that illustrates the range of issues that have to be dealt with.

Allstate Insurance Company v. Hague
(1981), 449 U.S. 302, 101 S. Ct. 633; 66 L. Ed. 2d 521
(United States Supreme Court)

> [Some citations and footnotes have been omitted and some footnotes have been edited.]
>
> JUSTICE BRENNAN announced the judgment of the court and delivered an opinion, in which JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN joined.

> State provides a significant contact for the furtherance of some local policies. . . . The insured's place of employment is not, however, significant in this case. Neither the nature of the insurance policy, the events related to the accident, nor the immediate question of stacking coverage is in any way affected or implicated by the insured's employment status. The plurality's opinion is understandably vague in explaining how trebling the benefits to be paid to the estate of a nonresident employee furthers any substantial state interest relating to employment. Minnesota does not wish its workers to die in automobile accidents, but permitting stacking will not further this interest. The substantive issue here is solely one of compensation, and whether the compensation provided by this policy is increased or not will have no relation to the State's employment policies or police power.
>
> Neither taken separately nor in the aggregate do the contacts asserted by the plurality today indicate that Minnesota's application of its substantive rule in this case will further any legitimate state interest.[41] The plurality focuses only on physical contacts *vel non*, and in doing so pays scant attention to the more fundamental reasons why our precedents require reasonable policy-related contacts in choice-of-law cases. Therefore, I dissent.

NOTES

1. *Allstate v. Hague* may give the impression that American constitutional limitations on choice of law are so weak as to be non-existent. This is not so. In *Phillips Petroleum Co. v. Shutts* (1985), 472 U.S. 797, the Supreme Court reversed a judgment of the Supreme Court of Kansas which had upheld the application of Kansas law to the plaintiff's action. *Shutts* was a class action brought by a large number of natural gas lessors. There were plaintiffs resident in all 50 states and the suit concerned land in 11 states, including Kansas. They argued that Kansas law should govern their claim. The defendant, Phillips Petroleum, a Delaware corporation with its head office in Oklahoma, argued that it was unconstitutional to apply Kansas law to the entire claim. The Kansas courts held that in a nation-wide class action suit the law of the forum should

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is not limited to employees, but extends to all nonresident motorists on its highways. This safety interest, however, cannot encompass, either in logic or in any practical sense, the determination whether a nonresident's estate can stack benefit coverage in a policy written in another State regarding an accident that occurred on another State's roads.

[41]The opinion of Justice Stevens concurring in the judgment supports my view that the forum State's application of its own law to this case cannot be justified by the existence of relevant minimum contacts. As Justice Stevens observes, the principal factors relied on by the plurality are "either irrelevant to or possibly even tend to undermine the [plurality's] conclusion." . . . The interesting analysis he proposes to uphold the State's judgment is, however, difficult to reconcile with our prior decisions and may create more problems than it solves. For example, it seems questionable to measure the interest of a State in a controversy by the degree of conscious reliance on that State's law by private parties to a contract. . . . Moreover, scrutinizing the strength of the interests of a non-forum State may draw this Court back into the discredited practice of weighing the relative interests of various States in a particular controversy. . . .

apply unless compelling reasons exist for applying a different law. In allowing the defendant's appeal, Rehnquist J. said:

> [T]his is something of a "bootstrap" argument. The Kansas class-action statute, like those of most other jurisdictions, requires that there be "common issues of law or fact". But while a state may . . . assume jurisdiction over the claims of plaintiffs whose principal contacts are with other states, it may not use that assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law. It may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a "common question of law." The issue of personal jurisdiction over plaintiffs in a class-action is entirely distinct from the question of the constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum.
>
> Kansas must have a "significant contact or aggregation of contacts" to the claims asserted by each member of the plaintiff class, contacts "creating state interests" in order to ensure that the choice of Kansas law is not arbitrary or unfair. . . . Given Kansas' lack "interest" in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair to exceed constitutional limits.

2. Notice the limited right of review of state court decisions by the United States Supreme Court. None of the judges in *Hague* would have supported Minnesota's choice of law rule if the Supreme Court had the power to review state law. All that the Supreme Court could do was to make sure that Minnesota stayed within the constitutional limits on its power to apply its own law.

3. We cannot now investigate even some of the cases referred to in the judgments. What is clear is that there may often be a complicated inquiry necessary to determine whether a state may properly apply its law to a case with geographically complex facts.

4. The criteria used by the Supreme Court are, to say the least, varied and comprehensive. The plurality mentions:

(a) Minnesota's concern for its non-resident employees;

(b) the fact that Allstate does business in Minnesota; and

(c) the respondent, the deceased's widow, became a Minnesota resident before the litigation began.

The validity of these "contacts" is certainly open to challenge and, indeed, the volume of academic comment—mostly negative—following *Allstate v. Hague* was considerable.

5. The power of the Supreme Court of Canada in a case analogous to *Allstate v. Hague* would be (subject to what may be derived from *De Savoye v. Morguard Investments Ltd.*) based on subsections 92(13) and 92(14) of the *Constitution Act, 1867*. Those subsections provide:

> **92.** In each province the Legislature may exclusively make Laws in relation to Matters coming with the Classes of Subject next hereinafter enumerated; that is to say, —
>
> . . .
>
> **13.** Property and Civil Rights in the Province.
>
> **14.** The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both the Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

6. It is accepted that these subsections limit the powers of the provinces to legislate extraterritorially. Hogg, in *Constitutional Law of Canada* 2nd. ed., p. 275, ff, discusses how the *Allstate v. Hague* problems might be dealt with in Canada. He observes, for example, at p. 279:

> While Canada does not have an equivalent to the due process clause of the fourteenth amendment for cases where only economic issues are at stake, in my view the due process test, as elaborated in [*Moran v. Pyle National (Canada) Ltd.*], could as easily serve as a test of extraterritoriality under the Constitution of Canada.

The Supreme Court of Canada dealt with problems of extraterritoriality in *Interprovincial Co-operatives Ltd. and Dryden Chemicals Ltd. v. The Queen in Right of Manitoba*, [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321. Manitoba passed legislation that provided that compensation would be paid to fishermen whose business had been damaged by the discharge of pollutants into rivers that flowed from Saskatchewan and Ontario respectively into Manitoba. In the same legislation, Manitoba took a statutory assignment of any cause of action that the fishermen might have had against those who caused the pollution. The appellants, the defendants, had plants in Saskatchewan and Ontario respectively and pollution from their plants had been carried by the natural flow of the rivers into Manitoba. Manitoba brought an action against the appellants under the legislation claiming an injunction and damages equal to the amount of compensation paid by the province. The legislation specifically provided that it was not a defence to the Manitoba action that the discharge of the pollutants was permitted under the legislation in force in the other provinces.

The defendants brought an application to have those portions of the Statement of Claim that referred to the legislation struck out. The trial judge acceded to the defendants' application, the Court of Appeal reversed that decision. The defendants appealed to the Supreme Court of Canada.

The court split 3:3:1. Pigeon, Martland and Beetz JJ., in a judgment given by Pigeon J., held that the Manitoba legislation was *ultra vires* the province. Pigeon J. referred to the judgment of the Manitoba Court of Appeal upholding the Manitoba legislation which had upheld the legislation on the ground that Manitoba could, under the Constitution, legislate with respect to torts committed abroad. He said: (at p. 352, D.L.R.)

> With respect, I fail to see how the [legislation] can be said in the present case to be directed against acts done within Manitoba. The essential provision on which Manitoba relies to claim against the appellants is the discharge of a contaminant from premises outside Manitoba into waters whereby it is carried into waters in the province. While it can be said that the legislation is aimed at damage caused in Manitoba, it is not directed against acts done in that Province: The basic provision on which the claim is founded is an act done outside the Province, namely, the discharge of the contaminant.
>
> . . .
>
> As to the extent of the constitutional authority that can be derived from the presence of the appellants within Manitoba, it is necessary, in my view, to bear in mind that the fact that a party is amenable to the jurisdiction of the Courts of a Province does not mean that the Legislature of that province has unlimited authority over the matter to be adjudicated upon. The authority conferred by s. 92(14), *British North America Act, 1867*, is limited to "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both the Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts." This certainly does not include the substantive law to be applied. The authority over substantive law must be derived from other heads. This is implicit in the judgment of the

> Privy Council in *Royal Bank of Canada et al. v. The King*, [1913] A.C. 283, 3 W.W.R. 994, 9 D.L.R. 337. . . .

Pigeon J. then referred to *The King v. National Trust Co.*, [1933] S.C.R. 670, [1933] 4 D.L.R. 465, where the court held that it was not competent for the province to determine the *situs* of property for the purposes defining the subjects of provincial taxation and said: (p. 355, D.L.R.)

> It seems to me that the same reasoning should be applied to in the construction of "Property and Civil Rights in the Province". It is not within the authority of a provincial Legislature to define or to extend the scope of its constitutional jurisdiction. Hence the fact that a person is amenable to the jurisdiction of its Courts cannot serve as a basis for imposing obligations in respect of torts any more than in respect to taxation. . . . Thus, the situation is that, although presumably the appellants' operations are authorized by the law of the Province where they are effected, they are sought to be enjoined under the laws of another Province by virtue of an enactment of that other Province.
>
> In the circumstances of this case, I find it necessary to say that it does not appear to me that a Province can validly license on its territory operations having an injurious effect outside its borders so as to afford a defence against whatever remedies are available at common law in favour of persons suffering injury thereby in another Province. . . . In my view . . . at common law, pollution of waters to an injurious degree is a tort that gives rise to a cause of action for those whose property rights are affected thereby. I fail to see how a provincial authority could, by licensing polluting operations, destroy this cause of action as against persons whose rights are affected outside its borders. . . .
>
> As between sovereign countries, such problems can be settled only by international agreement such as was done in the case of damages caused in the U.S. by the smelter at Trail, B.C. The Courts of the respective States would be bound to consider their own laws as conclusive. However, as between different Canadian Provinces, the situation is not in all respects the same as if they were independent States. There is a constitutional limitation on their legislative authority and there is a common forum to enforce it. . . .
>
> The basic principle of the division of legislative powers in Canada is that all legislative power is federal except in matters over which provincial Legislatures are given exclusive authority. Such authority is under every head expressly or impliedly restricted to the provincial territory. In deciding what is "within a Province", the Courts must obviously look for guidance at decisions rendered in matters of private international law. However, there is a very important difference between those cases and those that arise under our constitution. When a court is called upon to choose as between the laws of two countries the proper laws to be applied for the solution of some private dispute, it must in the end be guided by the laws of the State that created it. But the superior Courts of the Canadian Provinces are not State Courts. "They are . . . the Queen's Courts, bound to take cognizance of and execute all laws, whether enacted by the Dominion Parliament or the Local Legislatures". Hence, when the question before them is where does the legislative authority reside over a given subject in Canada, there is always the possibility for them to find that it is not in any provincial Legislature but in the Parliament of Canada.
>
> . . .
>
> [W]here business contracts affect interprovincial trade, it is no longer a question within provincial jurisdiction. The matter becomes one of federal jurisdiction. . . . In my opinion, the same view

> ought to be taken in respect of pollution of interprovincial waters as with respect to interprovincial trade. . . .
>
> It seems to me that in the present case, the question from the point of view of constitutional legislative authority, is not at all the same as in a lawsuit between private parties where the question arises whether the proper law to be applied is the law of the place where the tortious act was committed or that of the place where the damage was suffered. In such a situation, a choice has to be made and regard must sometimes be had for both to a certain extent. If the two elements have occurred in different countries and there are bases on which the Courts of both countries can take jurisdiction, there are no guarantees against conflicting decision: see *The "Atlantic Star"*, [1974] A.C. 436. Fortunately in Canada, no such situation exists. There is a common forum having unifying authority over all superior Courts. Concurrent jurisdiction will not therefore authorize the Courts of one province to disregard the authority of those of another: *Bank of Montreal v. Metropolitan Investigation & Security (Canada) Ltd.*, [[1975] 2 S.C.R. 546, 50 D.L.R. (3d) 76]. . . . The recent decision of this court in *Moran v. Pyle National (Canada) Ltd.* . . . deals only with *situs* for jurisdictional purposes, not with the rules used to identify the legal system under which the rights and liabilities of the parties fall to be determined. In our federal context, the two sets of rules are not interdependent due to the nature of our Superior Courts which are not purely provincial and to the existence of a common forum having general appellate jurisdiction in all matters.
>
> Coming back to the facts of the present case, it appears to me equally impossible to hold that Saskatchewan and Ontario can license the contaminant discharge operations so as to preclude a legal remedy by those who suffered injury in Manitoba, or to hold that Manitoba can, by prohibiting the discharge of *any contaminant* into waters flowing into its territory, require the shutting down of plants erected and operated in another Province in compliance with the laws of that Province. . . .

In the result Pigeon J. held that the Manitoba legislation was *ultra vires* the province.

Laskin C.J.C., Judson and Spence JJ. would have upheld the legislation. Laskin C.J.C. noted that the Manitoba courts had *in personam* jurisdiction over the defendants. He then said: (p. 338, D.L.R.)

> Jurisdiction *in personam* being uncontested, the issue in this case turns therefore on applicable law to govern the liability of the appellants for the damage and loss suffered in Manitoba. I do not see how it can be said that the Manitoba Act denies to the appellants any legal rights they acquired in Saskatchewan or Ontario in respect of the operations of their respective chlor-alkali plants. If, as is assumed for the purposes of this case, they are respectively licensed to discharge contaminants to the extent that they did, that licence, local to each of the Provinces, does not have an extra-territorial reach to entitle each of them with impunity to send their pollutants into the waters of another Province. That would be to assert against Manitoba an extra-territorial privilege and to use it as a basis for denying to Manitoba any local internal power to charge Ipco and Dryden with civil liability for damage produced in Manitoba to Manitoba property interests.
>
> . . . One might argue, with equal want of logic, that an American State could authorize pollution of an international river flowing into Manitoba and thus immunize the polluter against liability in Manitoba for damage caused in Manitoba. To put the matter in tort terms, Ipco and Dryden in discharging a pollutant into waters that flow into an adjoining Province created a risk of harm

there that could not be justified by reliance on permission that was necessarily limited to the waters and the fisheries in the licensing Provinces.

What must be the resort of Ipco and Dryden is that Manitoba law does not, or does not alone, govern the liability of the appellants for the damage and loss that occurred in Manitoba. What, then, is the law that governs this liability, or is it, in any event, open to Manitoba to determine for itself, having jurisdiction over the appellants, how their liability should be determined for damage and loss in Manitoba? . . . In my opinion, choice of law principles relative to the place of the commission of the tort in the present case make it appropriate for Manitoba to apply its own law, whether common law or statute law, to the liability of Ipco and Dryden; and, moreover, I find no excess of constitutional power in the way in which the impugned legislation operates. In short, I do not regard this as a case where Manitoba has purported to bring within its borders a tort which could not justifiably be litigated there under Manitoba law by common law choice of law principles. . . .

Manitoba's predominant interest in applying its own law, being the law of the forum in this case, to the question of liability for injury in Manitoba to property interests therein is undeniable. Neither Saskatchewan nor Ontario can put forward as strong a claim to have their provincial law apply in the Manitoba action; in other words, the wrong in this case was committed, or the cause of action arose in Manitoba and not in Saskatchewan or Ontario. There is hence no need to consider *Phillips v. Eyre* . . . or other cases in which it has been considered or reconsidered such as *Chaplin v. Boys* . . . since these cases involve the situation where the tort or wrong or the cause of action had arisen outside the forum or the jurisdiction in which the suit was brought. . . . To the extent that the recent decision of this Court in *Moran v. Pyle National (Canada) Ltd.* . . . may be said to relate to choice of law principles as well as to jurisdiction,it supports the view I take here as to the place where the action arose.

If, as I would hold, Manitoba law is applicable to redress the injury suffered in that Province, how can there be constitutional infirmity in its imposition of liability merely because the cause of the damage arose outside Manitoba, or because as a result of the damage fishing in Manitoba has been halted by the governing regulatory authority or because Manitoba refuses to recognize the lawfulness of the of the pollutant outside Manitoba?

. . .

In my view the appellants' contention of constitutional invalidity based on the alleged deprivation or divestment of a "right" outside Manitoba proceeds upon a misconception. What the appellants are claiming is an immunity in Manitoba based on a licence to pollute granted outside. That licence was not granted as gainst the respondent herein or against any of the assignor fishermen, not could it be. Manitoba in enacting [the legislation taking away the appellants' defence], simply took care to exclude any possible contention that a licence granted in another Province could provide against liability for injury to Manitoba property. . . .

Ritchie J. gave a separate judgment in which he agreed with the conclusion of Pigeon J. with the result that the Manitoba legislation was held to be invalid. Ritchie J. held that *Phillips v. Eyre* governed the matter and that Manitoba was asserting an extra-territorial right against the appellants. He said (p. 350, D.L.R.) that the claim was "a clear assertion of a right of one Province to enter into another and there invoke its own law so as to restrain companies who have a presence in all three Provinces from exercising rights which they are assumed to have under licences from the Province where the discharge took place."

We have no idea what the effect of this judgment should have had on Canadian conflicts theory or practice: as a matter of fact it has had none. It is clear the both Laskin C.J.C. and Pigeon J. had views on the proper functioning of traditional or non-traditional conflicts rules, but the nature of those views is not easy to determine. We would like to suggest that the case—there is no true majority for any opinion—is, at least, consistent with the view that the Supreme Court has and will assert a power to control assertions of provincial power, whether directly or through conflicts rules, that might improperly affect foreign parties.

The Supreme Court dealt with another similar issue in *R. v. Thomas Equipment*, [1979] 2 S.C.R. 529, 96 D.L.R. (3d) 1. Alberta had a statute, the *Farm Implement Act*, R.S.A. 1970, c. 136, that imposed on the vendor of farm implements an obligation to re-purchase enforceable through the criminal law. The accused was a maker of farm implements in New Brunswick. It had sold implements to a dealer in Alberta. The contract between the accused and the dealer was governed by the law of New Brunswick. The accused was convicted at trial. An appeal by way of a stated case was allowed and a further appeal to the Court of Appeal was dismissed on the ground that no offence had been committed in Alberta. Sinclair J.A. dissented on the ground that the vendor who chooses to sell in Alberta "must comply with the rules of the game" made by the legislature of Alberta. The Crown appealed.

A majority of the Supreme Court, in a judgment by Martland J., allowed the Crown's appeal. Martland J. preferred the judgment of Sinclair J. in the Court of Appeal and held that what the accused did in Alberta brought it within the provisions of the Alberta statute. Its contract with the Alberta dealer, who had an exclusive agency, was more than just a contract of sale. The offence was committed when the accused failed to re-purchase the goods in Alberta. He concluded by saying:

> . . . [T]he liability of [the accused] arose out of its conduct in Alberta. It had, in Alberta, rendered itself subject to the regulatory provisions of the *Farm Implement Act*. It had failed to comply with those regulation and the penalty imposed upon it was because of that failure. [The accused] is not being penalized under the Act for its conduct in New Brunswick, but because of what it failed to do in Alberta.

Martland J. distinguished *Interprovincial Co-Operatives* on the ground that the Manitoba legislation was aimed at conduct outside the province.

Laskin C.J.C. dissented. He observed that the contract was an outright sale to the dealer, not a sale through the agency of the dealer to Alberta purchasers. He said:

> For a non-resident of New Brunswick to invoke the operation of the law of his Province of residence, here Alberta, against his New Brunswick co-contractor simple because of the presence in Alberta of goods which had been purchased from the New Brunswick manufacturer is to me an attempt to give Alberta law an extra-territorial application. The goods belonged to [the dealer], and it purports to say to the New Brunswick manufacturer that "you must re-purchase them from me because Alberta law so provides when I have terminated my agreement with you". The stated case . . . shows that the letter of termination was sent to [the manufacturer] in New Brunswick and, certainly, it could not have any effect until it was received by [the accused] there. How then

> does the termination in New Brunswick of a contract made in New Brunswick which, by its terms is governed by New Brunswick law, give [the dealer] any claim to apply unilaterally against [the accused] a statutory advantage to [the dealer] based on Alberta law?
>
> [The manufacturer] is entitled to say that it is not bound by a law of Alberta which seeks to modify to its disadvantage its contractual arrangement with [the dealer]. Moreover, under the terms of the contract, the power of [the dealer] to terminate is associated with a requirement that any indebtedness to [the manufacturer] has been paid in full.

Laskin C.J.C. then observed that if the manufacturer is required to play by the rules of the Alberta game, it is equally appropriate that the dealer should play by New Brunswick law.

Where we go from here is, again, anything but clear. Both judgments could have some bearing on traditional conflicts theory, particularly on the issue of "party autonomy", *viz.*, what scope do the parties have to determine the laws applicable to their relation? We wonder if the decision to apply Alberta law would have been the same if it had merely given the dealer a cause of action against the manufacturer, rather than made the failure to re-purchase a criminal offence. Laskin C.J.C. sees the issue much more in contract terms than does Martland J.

The following article, edited to remove arguments that have now been largely adopted in *De Savoye v. Morguard Investments Ltd.*, discusses the constitutional implications of choice of law in the Canadian context and offers a solution to the problems we now face.

Swan, "The Canadian Constitution, Federalism and the Conflict of Laws"
(1985), 63 *Can. Bar Rev.* 271 - 321.

Introduction

> The argument of this article is that issues of the Conflict of Laws raise important questions of constitutional law and federalism that have largely been ignored in every discussion of federalism, constitutional law or conflicts in Canada. Once these issues are explicitly raised and examined a number of seemingly intractable problems are resolved and a basis for a radical reassessment of the Conflict of Laws is revealed. The approach that I take is based to a significant degree on the analysis of conflicts problems worked out in other federal states in the common law tradition. I shall focus particularly on the law of the United States. On occasion I will also refer to the Australian experience, though, as we shall see, that at first glance, obvious comparison does not turn out to be as helpful as one might expect.
>
> Among federal states, Canada is unusual in that there are no express provisions in any of its constitutional documents dealing with issues of federalism raised in Conflict of Laws cases. There are three such issues: judicial jurisdiction, recognition and enforcement of extra-provincial judgments and choice of law. Of course, these issues arise not only in inter-provincial but also in international cases, but for the moment their disposition in the former setting will be the focus of inquiry. Both the American and the Australian constitutions deal with these issues (or some of them) in express constitutional provisions. It is natural

Chapter 15

Summary and Conclusion

It would be foolish to suggest that Canadian judges are about to adopt a theory of conflicts based on the elaboration of the constitutional requirements of "due process" and "full faith and credit" that the American courts have developed. It would be equally hard to find in the judgments in *Interprovincial Co-operatives* and *Thomas Equipment* much upon which a coherent "made in Canada" approach could be based. We believe, however, that, while the pace of reform may be erratic and the direction uncertain at times, reform will come: *Moran v. Pyle National (Canada) Ltd.* has been, after all, picked up and developed in *De Savoye v. Morguard Investments Ltd.*.

The response of the Ontario Court of Appeal in *Grimes v. Cloutier* and that of the Supreme Court in *De Savoye v. Morguard Investments Ltd.* suggest, as will always be the case, that courts are not indifferent to arguments based on fairness and on the need to reach satisfactory results. Counsel's job is, again as always, to offer the courts "pegs" to hang arguments on and arguments that are strong enough to carry the court far enough to protect his or her client yet not so strong as to carry the court too far so that it is frightened that it is embarking on a radical new direction. What we hope we have done is to suggest an approach that is faithful to all the values—the values that we discussed in the early chapters of this Volume—that law exists to forward and consistent with the way in which the law may be properly elaborated and developed.

That approach, when applied in the Canadian context, can be simply stated. The heart of what we have suggested is that we abandon the pursuit of uniformity as a goal of conflicts. By "uniformity" we mean, of course, the goal that similar cases should be decided in similar ways in two provincial courts. It is this goal that underlies the traditional theory and all the modern American theories, those of the Restatement Second and people like Cavers with his "principles of preference". Currie's theory of "governmental interests" as elaborated by courts like the California Supreme Court in *Bernhard v. Harrah's Club* (noted *supra*, p. ?) reflects an attempt, referred to as the "comparative impairment" doctrine, that is predicated on the belief that *both* California and Nevada could (and even, perhaps, would) reach the same conclusion, *viz.*, that California's interest is more important than that of Nevada. Currie, himself, never went this far and he was content to leave "true conflicts" to be resolved by the law of whatever jurisdiction was the forum. We part company with Currie because we believe that courts must weigh something when they make a decision in a case that presents strong competing claims from both parties, i.e., a difficult case. We say that courts must weigh "something" because what they must consider is, for example, the heart of the problem in *Allstate v. Hague*. You will remember that part of the problem facing the United States Supreme Court was that court's inability to reverse or review the Minnesota court's application of choice of law rules. The Canadian Supreme Court of Canada is not subject to the same disability and could police not only the extraterritorial aspect of provincial law but also a province's choice of law rules. As

we have argued, we do not think that choice of law rules, *eo nomine*, exist: each provincial court has to look at any problem it faces, whether it is one with or without geographically complex facts, as a contracts or torts problem in the context of the Canadian constitution and that the Supreme Court has no basis for, so to speak, second-guessing the provincial Court of Appeal.

This fact means that the job of the Supreme Court is not significantly different from that of the United States Supreme Court. We say this because once the Supreme Court has held that a provincial court is acting within the scope of the power conferred on a province by the *Constitution Act, 1867*, that court is entitled to apply its own law, subject to the constitutional limitation reflecting the limits set by s. 92(13). That limitation, while traditionally regarded as simply a requirement that provinces not legislate extra-territorially, may, as Peter Hogg suggests, (*supra*, p. ?) be seen as having a "due process" component. In other words, the tests that are adopted to deal with issues of extra-territoriality also provide a "due process" test and together these tests exhaust the concern of the Supreme Court.

We do not think, and indeed, if pushed, would be prepared to deny that there is a "federal common law" that would support, for example, a judgment of the Supreme Court that some transcendant national tort value exists, justifying a limitation on the power of a provincial court to apply its own law to a matter constitutionally within its "legislative" authority. There is, to give a concrete example, no national standard that would resolve the conflict between Ontario and Québec on the (modified) facts of *O'Connor v. Wray*. There is, we believe, no basis upon which the Supreme Court can create national standards in matters exclusively subject to provincial control.

This last point raises the final issue we want to address.

UNIFORMITY AND DIVERSITY IN THE FEDERAL COURT

There is one further dimension to the role of the Supreme Court of Canada that needs to be mentioned. The resolution of the true conflict problems of *Lilienthal v. Kaufman*, *O'Connor v. Wray* and *Going v. Reid Bros.* could present the Supreme Court with the need to choose between a solution that accepted as inevitable the fact that different provinces might, for perfectly valid reasons, reach different results, and one that said that there had to be a uniform standard. Pigeon J. in *Ipco* appears to accept the unifying role of the Supreme Court as an accomplished fact. (See, *supra* p. ?). It is not clear from that case whether he really sees the significance of what he is saying. What is at stake can be seen from another angle: the role of the Federal Court of Canada. It must, however, be admitted immediately that, for a variety of reasons, what may be seen in this way may be seen only "through a glass, darkly" and that our views are, at best, very cautious and undeveloped. Certainly they are unexplored in the jurisprudence of the Court itself.

The issue facing Canada can, once again, be most clearly seen from the U.S. experience. Notice that the decision in *Allstate v. Hague* was an appeal from a decision of a *state* court. The

Supreme Court deplored the state court's choice of law rule, or, to be precisely accurate, they deplored its decision to apply its own law, even though Minnesota's doing so would neither be the result reached by a Wisconsin court (though the purposes of "stacking" or "anti-stacking" rules are not transparently obvious), nor a violation of the XIVth Amendment. The question that has exercised some American commentators is whether a choice of law rule like Minnesota's should be applied by the federal courts.

The problem arises in this way. The jurisdiction of the U.S. Federal Courts, the District Courts, is available in a far wider range of circumstances than is the jurisdiction of the Federal Court of Canada. What is most relevant for our purposes is the jurisdiction of federal courts in the U.S. in "diversity cases". This phrase refers to cases in which the parties are citizens of different states. The actual rules do not concern us here. One of the early problems of the U.S. federal courts was what law they should apply. Should a federal court in New York, for example, accept as the basis for its decision, the rule propounded by the New York courts or the rule that the federal court might think would be more appropriate in the circumstances. The initial resolution adopted the latter option: *Swift v. Tyson* (1842), 16 Pet. 1; 10 L. Ed. 865.

Such a rule would be plainly unworkable. The result in a case, a case presenting no facts of geographical complexity relevant to the merits, would depend on where the action would be brought, in the state court or in a federal court in the same state. The rule laid down in *Swift v. Tyson* lasted until it was overruled in *Erie Railroad Co. v. Tompkins* (1938), 304 U.S. 64; 58 S. Ct. 817. *Erie* established the rule that a federal court was bound by state court determination of state law. This seemingly simple proposition is, however, by no means free from difficulty and it raises all the problems of determining what the "law of a jurisdiction" is. There are, of course, rules of any jurisdiction that are very clearly established and these can be easily applied. There is a very large body of the law of any jurisdiction upon which it is nearly perfectly safe to rely. Such rules include those for ensuring that a corporation is properly created, that a person gets good title to property, that a loan can be enforced, that a will is valid, etc. There are, however more debatable rules. The problem presented by *Erie* is how a federal court is to determine what the law of a state is in a matter of controversy or doubt. What if there are conflicting decisions of co-ordinate courts? What if a rule is plainly an anachronism? Since the Circuit Court of Appeals and the Supreme Court itself are federal courts, are they bound by the decision of a state equivalent of a provincial or county court?

Notice that the true conflict problems of *O'Connor v. Wray* and (with a less restrained court in) *Grimes v. Cloutier*, even if one opts for diversity, do not raise the problems implicit in *Erie* for the Supreme Court in a case that has started in a provincial court and not in a federal court. An appeal lies to the Supreme court only from a decision of the provincial Court of Appeal, which court may be regarded as authoritatively pronouncing upon the precise point of provincial law relevant in the case. It is not as if an "outside" court had to ask itself what the provincial court of appeal would do if it considered the case. The court of appeal has, for the particular case before it, at least, resolved all problems of what the law of the province is. The problems of *Erie* arise precisely because a federal court in the United States is NOT a state court. The true conflict (diversity option) is possible only because provincial courts can be regarded as

articulating in an authoritative way the values of a province as they are relevant in a particular case.

The problems do not end here. *Erie* held that in a case where, as to the merits of the dispute, there were no geographically complex facts, the federal courts must accept state court determination of state law. But what happens in a case when the decision on the merits presents geographically complex facts? The United States Supreme Court in *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.* (1941), 313 U.S. 487, 61 S. Ct. 1020, held that, as a necessary consequence of *Erie*, federal courts must accept state court determinations of conflicts rules. Mr. Justice Reed, who delivered the opinion of the court said in support of this conclusion (pp. 496, 497):

> We are of the opinion that the prohibition declared in *Erie Railroad v. Tompkins* . . . against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. See *Erie Railroad v. Tompkins*. . . . Any other ruling would do violence to the principle of uniformity within a state upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbours. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. . . . This Court's views are not the decisive factor in determining the applicable conflicts rule. . . . And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be.

The issue raised by *Klaxon* and which is implicit in *Erie* is the extent to which uniformity or diversity is desirable or acceptable as a matter of one's view of what kind of federalism one should have. The argument centres on the statement made by Pigeon J. in *Interprovincial Co-operatives* as regards the unifying role of the Supreme Court. An argument can be made (and is made, for example by Hart and Wechsler, *The Federal Courts and the Federal System*, 2nd. Ed. Bator et al. (Eds.) Mineola; Foundation Press, 1973, pp. 713-715 that the role of a federal court is not the same as that of a state court and that, in a federal court, there are no conflicts problems between state laws because the point of view of the federal court is national and not local. The editors of the 2nd Edition of *Hart & Wechsler* do not share the view of *Klaxon* taken by the original editor, but they summarize the latter's view (pp. 714-715)

> In the first edition of this book (pp. 634-35), the authors marshalled the arguments against *Klaxon* as follows:
>
> Consider the application of *Erie* and of *Klaxon* to problems of the choice of plainly substantive rules of decision, such as those in *Erie* itself and in *Swift v. Tyson*.

Notice again that these rules do much more than provide the underlying premises of a decision on the merits when litigation occurs. They help to organize and guide people's everyday lives. Notice that confusion and uncertainty about the rules of law which are relevant at this stage of primary private activity is far more serious that uncertainty about rules which become material only if litigation eventuates. This is so, if for no other reason, because the number of instances of the application of law at the primary stage bears to the number of instances of its application in litigation the ratio of thousands and hundreds of thousands to one.

As applied in non-conflicts situations, *Erie* might have been regarded, might it not, as based at least in significant part on the proposition that it is intolerable to have two different systems of courts deciding questions of plainly substantive law differently, where it is unpredictable which system will acquire jurisdiction, since that not only introduces an element of retroactivity into every judicial disposition of such disputes as develop but confuses basic legal relations throughout the area of primary activity affected by the overlap? Notice that it was in the context of questions of this kind that Justice Brandeis spoke of the "unconstitutionality" of the course which the federal courts had pursued. See Hill, "The Erie Doctrine in Bankruptcy", 66 *Harv. L. Rev.* 1013, 1031-35 (1953).

If this view of *Erie* had been taken, the problem of making out the scope of its application in non-conflicts situations would have reduced itself, would it not, to one of distinguishing between (a) those rules of law which characteristically and reasonably affect people's conduct at the stage of primary private activity and should therefore be classified as substantive or quasi-substantive, and (b) those rules which are not of significant importance at the primary stage and should therefore be regarded as quasi-procedural or procedural?

Consider the bearing which such an analysis of *Erie* would have had in situations involving state-verses-state conflicts of plainly substantive law.

Notice that *Swift v. Tyson* had solved the problem of uncertainty about the applicable substantive law for people who could anticipate access to a federal court. *Erie* destroyed this assurance, but mitigated the damage with an alternative assurance of the uniform enforcement in any federal court of whatever state law was applicable. *Klaxon* destroyed the mitigation, did it not?

Erie must largely have proceeded upon the assumption, must it not, that the prime need was for an assurance of state-federal conformity in the interest of people who could not be sure of a federal forum? *Klaxon* cut down the value of this new assurance, did it not, largely to those situations in which it is possible to foresee the state in which litigation will take place? In what proportion of situations is this possible, when the people involved are of diverse citizenship?

Would it be accurate to conclude that *Klaxon*, in effect, treats *Erie* as if it had been unconcerned with the problem of uncertainty about the applicable substantive law at the stage of primary private activity? Was it necessary to do this? Why should forum-shopping between different courts in the same state have been regarded as the *summum malum* of diversity litigation while forum-shopping among courts in different geographical areas was dismissed as an inescapable weakness of a federal system? Did the Rules of Decision Act have to be read as authorizing the plaintiff, and the courts of the state he selects, to decide which state's laws are the laws which apply, rather than the federal court?

(Note, the references to "primary private activity" and "primary activity" come from Hart and Sachs, *The Legal Process*, Tentative Edition, 1958, pp. 210 et seq. The Hart of Hart & Sachs is the same person as the Hart of Hart & Wechsler.)

The attitude that any court or author takes to the issue just discussed will be largely determined by the conception that one has of conflicts rules. The editors of the first edition of Hart & Wechsler had, we think, a view of conflicts that is closer to ours than is, for example, that of Justice Reed in *Klaxon*. Issues of uniformity will only arise to the extent that it is a goal that is to be sought at all times. We do not deny that uniformity is sometimes a "good thing", after all, one conception of justice is that like cases be treated alike. Our concerns, like the editors of Hart & Wechsler, is that uniformity is either, as a matter of fact, unattainable or attainable only at too high a price. Uniformity is unattainable because no common balancing of the values at stake can be expected. The price that, in any federal system, would be too high is where uniformity would necessarily involve the assertion of national values at the expense of local ones, local ones that the federal structure was established to protect.

We can now put this issue back into context of the Federal Court of Canada and see where we go. It is first important to notice, as we have mentioned, that the jurisdiction and importance of the Federal Court of Canada are far less than those of the U.S. federal courts. Yet it is clear that the Canadian courts have to face the issue of *Erie* (and if Erie has to be faced, can *Klaxon* be far behind?). The scope for an *Erie* doctrine in Canada has not been squarely faced in Canada though there are cases where it is assumed to apply: *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; 62 D.L.R. (3d) 1. The issue raised was the application of an apportionment rule in an action for negligence brought in the Federal Court. The collision which gave rise to the claim occurred in English Bay in Vancouver and the trial was held in Vancouver. The Supreme Court gave more or less automatic acceptance of the relevance of the *provincial* apportionment legislation (*Contributory Negligence Act*, R.S.B.C. 1960, c. 74 (now *Negligence Act*, R.S.B.C. 1979, c. 298)). Ritchie J. said "I can see no reason why a claim under . . . the *Federal Court Act* should not be governed in that court by the substantive law of the province concerning division of fault" (p. 823 (S.C.R.), p. 16 (D.L.R.)). This statement may now be far more contentious after certain later cases in the Supreme Court. (See, Laskin and Sharpe, "Constricting Federal Court Jurisdiction: A Comment on *Fuller Construction*" (1980), 30 *U.T.L.J.* 283, 300-301).

The most fruitful sources of the problem of choice of law in the federal court arise in the exercise of that court's admiralty jurisdiction. This jurisdiction is based on s. 22 of the *Federal Court Act*, R.S.C. 1985, c. F-7. There have been a number of cases concerning claims against stevedores and the effect of "Himalaya Clauses" in bills of lading: *ITO - International Terminal Operators Ltd. v. Miida Electronics Ltd.*, [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641, and *Saint John Shipbuilding & Dry Dock Co. Ltd. v. Kingsland Maritime Corp.* (1981), 126 D.L.R. (3d) 332 (Fed. C.A.).

Both cases raise a very curious issue, *viz.*, is there a federal common law of contracts that is not the same as the provincial common law of contracts? In *ITO*, the Supreme Court held, in a judgment by McIntyre J. that a clause in an international bill of lading was enforceable by the stevedores, a third party to the contract, in spite of the fact that the Supreme Court, in another judgment by McIntyre J. had held in *Greenwood Shopping Plaza Ltd. v. Beattie*, [1980] 2 S.C.R. 228, 111 D.L.R. (3d) 257, that such clauses would not be enforceable because of the

notorious third party beneficiary rule. The Supreme Court also held that it had jurisdiction because the claim was in admiralty and that, in admiralty, the law to be applied was the common law of contract. The litigation in *ITO* was begun in Montreal. The Supreme Court applied the common law of contract without ever adverting the possibility that the civil law of contract (which, for example, would have permitted a claim by a third party beneficiary) might have applied. The Supreme Court never adverted to the implicit "*Erie*" issues in that fact. It is, of course, possible to distinguish the two cases, *ITO* and *Greenwood v. Beattie*, but the jurisdiction of the Federal Court is confined to matters governed by "Canadian maritime law or any other law of Canada" (s. 22(1)) and we are left with the odd result that there is a common law of contracts that is not the same as the provincial common law of contracts.

Saint John Shipbuilding, another case involving the liability of a third party to a contract, raised a choice of law issue, *viz.*, whether a contract was governed by Swedish or New Brunswick law. The Federal Court of Appeal held that the parties had expressly chosen that the contract would be governed by New Brunswick law. The basis for this conclusion was the court's holding that a purchase order between the shipper and carrier expressly providing for the application of New Brunswick law was paramount over a bill of lading issued by the carrier expressly providing for the application of Swedish law. By the latter law the stevedores would be protected. They would not be protected, so the court held, under New Brunswick law. (As a contracts case, the issue presented is reminiscent of the "Battle of the Forms", but the court ignored this.) As a conflicts issue, the court decided that whether the stevedores should be protected was to be decided by which law governed the contract between carrier and shipper, regardless of the fact that, *ex hypothesi*, the stevedores were third parties to the contract. In *St. John Shipbuilding*, Heald J. said (p. 341, D.L.R.):

> I have therefore concluded that it is a necessary inference from the evidence in this case that it was the intention of the parties to the contract of carriage that Canadian law was to govern that contract (since the reference to New Brunswick law therein, in the context of this case, clearly means the law of Canada).

There is no "law of Canada" on contracts or conflicts. There is a common law of contracts which applies in the nine common-law provinces (and which may not be uniform) and two territories, and a civil law of contracts which applies in Québec.

What we have here is one of the fundamental problems of the Federal Court. Where does that court get its "private law" as opposed to its admiralty law rules from? Is it from the province where the court is or where the plaintiff started its action? Under the *Federal Court Act* the plaintiff may commence its action in the Federal Court anywhere in Canada, from Vancouver to St. John's? Why should it be assumed that the Federal Court, when applying law, which under the *Constitution Act, 1867*, is within the exclusive jurisdiction of the provinces, is to apply the common law?

The issue that we are focusing on can be seen if the choice of law issue involved a choice of Québec or New Brunswick law. On these facts it cannot be assumed that, in a case like *ITO*,

cases like *Scruttons Ltd. v. Midland Silicones Ltd.*, [1962] A.C. 446; [1962] 1 All E.R. 1, automatically govern (in spite of cases like *New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd.*, [1975] A.C. 154; [1974] 1 All E.R. 1015) since under Québec law, a stipulation *pour autrui* is clearly enforceable. Once we step outside traditional conflicts thinking the issue in a case like *St. John Shipbuilding* is whether the exemption clause in the standard arrangement between shipper and carrier should be given effect to or not. This is not simply a contracts question for the evidence might be very clear that the stevedore expected the protection of the bill of lading. Since there is no conceivable purpose behind the classical third party beneficiary rule (we are, after all, only fighting over whose insurer will bear the loss) it is hard to see how the choice between the provincial rules in conflict could be rationally made.

But, if we leave that issue aside, should the federal court simply choose as might a provincial court between the rules in conflict, or should it act in some different capacity? This issue can be put in Currie's terms. A New Brunswick court might somehow feel able to say that some purpose of New Brunswick law would be served by its application to the case so as to deny protection to the stevedores. Similarly (and more easily) a Québec court might say the same. Is the federal court not put in the awkward position of either being a disinterested forum or having to find a Canadian value? Notice that this distinction might, however, collapse. Unlike the U.S. federal courts, the Federal Court of Canada does not sit in any particular place and become identified with the law of that place.

On the actual facts of *St. John Shipbuilding* the court could, because of the express choice of law clause, fall back on what can be regarded as a contracts basis for the decision. (This is, of course hard to understand and apply given that both carrier and stevedore (and probably shipper) would, if they had been asked, have said that they expected the standard "Himalaya Clause" to apply. Can a choice of law clause deal with a matter that is, almost *ex hypothesi*, not resolvable by contracts analysis?) In *ITO* the action arose out of theft of goods stored in a warehouse in Montreal. The Federal Court of Appeal in that case ([1982] 1 F.C. 406, 124 D.L.R. (3d) 33) ignored the provisions of the Québec Civil Code and applied "Canadian Maritime Law" (the phrase used in s. 22 of the *Federal Court Act*) which was assumed to be the common law. LeDain J. went on to apply *New Zealand Shipping* and *Port Jackson Stevedoring Pty. Ltd. v. Salmond & Spraggon (Australian) Pty. Ltd.* [1981] 1 W.L.R. 138, [1980] 3 All E.R. 257 (P.C.) to hold that the stevedores might have had the protection of the "Himalaya clause" had it been broadly enough drafted to protect them.

The problem these cases raise is that which exercised the Americans from 1842 (*Swift v Tyson* (1842), 16 Pet. 1, 10 L. Ed. 865) to 1938 (*Erie Railroad Co. v Tompkins* (1938), 304 U.S. 64 58 S. Ct, 817) and beyond. We do not know what will happen in Canada: will the *Erie* doctrine, a doctrine requiring that, in the interests of uniformity between the law applied in the federal and provincial courts, be applied by the federal courts? If so, will those courts then apply the provincial law of the place where the plaintiff brings its action (with the obvious opportunities for forum-shopping that are possible under our rules)? Or will we tolerate the approach of Heald J. which ignores the fact that there is no Canadian law of contracts, and which imposes some kind of uniformity on the federal courts by simply finding that there is,

contrary to the Constitution, a federal "common law" for all Canada? Do we have a different set of rules where the matter lies within the Admiralty jurisdiction of the Federal Court and where it does not?

It can be seen from these cases that the federal court has not come to grips with the choice of law issues implicit in its decisions. Should it forward in *St. John Shipbuilding* the sensible rule of giving protection to stevedores even though a New Brunswick court might not? But if there is a true conflict, and if the federal court has no provincial perspective because it may not even be sitting in New Brunswick, can it do anything else but resolve the issue on some broader basis? Is it satisfactory (and consistent with Canadian federalism) to assume a basis for uniform decisions, and just happens to be the same as a common law?

The issue is made even more complex since, as Laskin and Sharpe (*supra*) point out, the jurisdictional limits of the Federal Court may preclude its consideration of certain provincial rules. The conflicts issue of this "self-denying ordinance" have never even been considered. Hogg, *Constitutional Law of Canada* 2nd. ed. pp. 142, ff, suggests that the common law may be as properly regarded as "federal law" as it is regarded as "provincial law." The phrase "Canadian Maritime Law" found in s. 22(1) of the *Federal Court Act* is itself interesting. The law of admiralty has very ancient roots and in many respects developed very different rules from the common law. An argument can be made that admiralty rules are the kind of rules that are both wide enough in scope and sufficiently generally acceptable to provide the conditions under which the elusive goal of uniformity could be achieved. Ehrenzweig, *Private International Law* (Leyden: A.W. Sijthoft, 1967) (the sub-title of this book is "A Comparative Treatise on American International Conflicts Law, Including the Law of Admiralty") has a provocative argument that the law of admiralty can function in just that way.

The meaning of "Canadian Maritime Law" and the history of the admiralty jurisdiction of the Federal Court are discussed by Laskin C.J.C. in *Tropwood A.G. v. Sivaco Wire and Nail Co.*, [1979] 2 S.C.R. 157, 99 D.L.R. (3d) 235, where he held that the jurisdiction conferred by s. 22 was broad enough to include conflicts rules. Laskin C.J.C. says (pp. 166, 167 (S.C.R.), p. 242 (D.L.R.)):

> What is raised by the appellant, shortly put, is whether it is open to the Federal Court, in exercising its jurisdiction in the matter brought before it, to determine, pursuant to conflict of law rules of the forum, a choice of law rule to govern the determination of the suit. In the present case, the Federal Court has jurisdiction over the appellant and over the cause of action and there is a body of law which it can apply. It is my opinion that this body of law embraces conflict rules and entitles the Federal Court to find that some foregoing law should be applied to the claim that has been put forward. Conflict rules are, to put the matter generally, those of the forum. It seems quite clear to me that s. 22(3) of the *Federal Court Act*, which I have already referred to, envisages that the Federal Court, in dealing with a foreign ship or with claims arising on the high seas may find it necessary to consider the application of foreign law in respect of the cause of action before it.

Without an *Erie* doctrine, two questions arise from this quotation: where is the forum? and what is a "foreign law"? Is the forum Canada and a foreign law simply a law that is not Canadian maritime law?

Cases in the Federal Court that do not fall within that court's admiralty jurisdiction continue to cause problems—admittedly ones that only we seem to be concerned about. For example, *Enterprises de Transport Marcel Boivin Inc. v. Canada* (1989), 44 B.L.R. 208 (Federal Court of Canada, Trial Division, Denault J.) was an action for breach of contract brought by the plaintiff against the federal government. The plaintiff had entered into a contract with the Canadian government for the collection of garbage from federal government sites. The contract contained specifications, stipulations and conditions on matters such as the way the work was to be done, when the garbage was to be picked up, the frequency of pick-ups and the quality of the work. After six months of providing service the government terminated the contract for alleged failure to provide the services in accordance with the stipulations and conditions of the contract. The grounds for termination were messiness, mainly caused by a leaky truck, difficulties in contacting the owner of the business and failure to remove garbage on several occasions according to the prescribed schedule. The plaintiff corrected the communications problem by appointing a real estate agent as a contact. The plaintiff also had its defective truck repaired. In any event, the truck apparently broke down again and garbage was collected using a small truck which itself broke down, not all the garbage was picked up, and garbage was strewn about the roadway. The Court found that the trucks indeed had broken down, that there was no replacement equipment and that the garbage pickup was not done in accordance with the work method and schedule contained in the specifications. The Court concluded that the services were not provided by the plaintiff in accordance with the terms of the contract.

The contract contained "default" provisions which allowed the Minister, upon giving notice to terminate the contract for a number of reasons, such as bankruptcy of the contractor, default under the terms, conditions, covenants or obligations of the contract, false representation or breach of warranty. The contract also contained a "termination" provision which allowed for termination of the contract between the parties. The default section also provided that if the default of the contractor was due to causes beyond the control of the contractor, then the termination provisions would govern.

The Court noted that if this were a contract between private parties, these termination rights would appear to be draconian. However, the court noted that different standards apply to a government contract where the government body is acting in the public interest and the other contracting party is acting in a private interest. The Court quoted from Pierre Lemieux, *Les contrats de l'administration féderale, provinciale et municipale* in contrasting the difference between a government contract and one concluded by private parties:

> but the difference with a contract concluded between private parties is that the default will be judged with a strictness and severity unknown to private law.

The Federal Court held that although termination of the contract might seem extreme, such power of termination was provided for in the contract and exercised in accordance with the provisions in the contract. Furthermore the Court held "there is no basis for intervention by the Court in the circumstances, either in terms of the legality of the clause or the way in which it was exercised."

In *Imprimerie Héon & Nadeau Ltée. v. Canada* (1990), 48 B.L.R. 225, (F.C., Pinard J.) a similar issue arose. The plaintiff sued for payment under a contract to print material for the federal government. The work had not met the standards set by the government which had rejected the entire print run. The plaintiff's claim was dismissed on grounds special to the government. The judge said: (p. 231)

> What we are dealing with here is an administrative contract where the government body is acting in the public interest and the private party is acting in a private interest. In this situation, the contractual penalty of termination, while a radical measure, is nevertheless recognized by academic opinion and the courts.

The academic opinion referred to by the court is that of Québec writers and the conclusion that the Federal Court is here applying the domestic civil law of Québec is inescapable. Only *Enterprises de Transport Marcel Boivin Inc. v. Canada* is referred to for judicial support by Pinard J. in *Imprimerie Héon & Nadeau Ltée. v. Canada*. You might note the following points:

A. the position of the Crown as a contracting party continues to cause the courts problems. Most of the special features of crown liability have been removed; Denault J. (and now Pinard J.) bring them in with an odd twist: the Crown is somehow a favoured contracting party *vis-à-vis* an ordinary commercial enterprise;

B. The jurisdiction of the federal court is Canada-wide. There has been no adequate analysis in any judgment or in any academic writing of the law that the Federal Court should apply to find principles to govern the rights of the parties when, in any action in a provincial court, the law would be in the exclusive legislative authority of a province. In other words, what private law regime governs actions brought in the Federal Court?

C. The standard contracts of the Department of Supply and Services and the provisions of the *Financial Administration Act* do not distinguish between "common law" contracts and "civil law" contracts. In the light of these two cases, what law governs the contracts made with the federal Crown?

The contracts issues implicit in these two decisions are equally puzzling. We shall not examine them here.

These issues cannot be further explored here. The range of cases before the federal courts is sufficiently small and its jurisdictional base sufficiently narrow that it is hard to argue that the

issues that have just been discussed are of great moment. They are, however, of interest in that they illustrate the extent to which we have not even begun to think through the consequences of the special role of all the federal courts, including the Supreme Court of Canada. Can that court do different things with provincial law depending on whether it sits on appeal from a provincial court or a federal court?

THE INTERNATIONAL CONTEXT

A comparison of the judgment of the U.S. Supreme Court in *Allstate v. Hague*—a judgment, incidentally, that has been fairly heavily criticized—and that of the Supreme Court of Canada in *Ipco* points out the problem of the scope of any conflicts approach. We believe that, as a result of the decision of the Supreme Court in *Morguard*, picking up and, so to speak, "dusting off" *Moran*, and the decision of the Ontario Court of Appeal in *Grimes* (subject to the "dampening" effect of *Tolofson*), there may now be an added impetus to the constitutionalization of choice of law in Canada. (*Tolofson* has a constitutional dimension in the decision to subject the Saskatchewan defendant to British Columbia law—an issue entirely ignored by the Court of Appeal.) The importance of the issues that these cases raise in conflicts cases between two provinces lies in the fact that the assertion of jurisdiction in any form, judicial jurisdiction or legislative (and common law) jurisdiction, can be policed or controlled by the Supreme Court. In the international sphere such control is not vested in any institution with the power of the Supreme Court. In *Hague*, Minnesota asserted "legislative" jurisdiction through its choice of law rules. The U.S. Supreme Court adopted a "hands off" attitude to that assertion which is significantly closer to the international model than is the Canadian one (at least as might be represented by the judgment of Pigeon J. in *Ipco* or by the Supreme Court review of provincial courts' choice of law rules of the traditional type). In *Allstate v. Hague*, at the same time as the court deplores Minnesota's choice of law rule it holds that that rule does not violate the "due process" clause of the XIVth Amendment.

If we are going to argue that, subject to the overall control of the Supreme Court (whether U.S. or Canadian), conflicts cases are ultimately transformed into constitutional cases, and that only in constitutional criteria will principled solutions ultimately be found, we have to be prepared to argue that very much the same approach must apply in international as opposed to interprovincial conflicts. It is vitally important to remember that the only constitutional issue ultimately presented to either Supreme Court which is difficult is the extent to which *in a case of a true conflict*, diversity between the results reached by two provinces can be tolerated. This issue forces us to articulate a view of federalism. We have a choice of views to adopt: one view accepts diversity, the other does not. As we have seen, the view that uniformity is desirable is usually and casually assumed to be the only valid one. Thus Hogg, *Constitutional Law of Canada* (2nd ed., 1985), pp. 173-4, regards uniformity of judicial decisions as a good in itself:

> In my opinion, the uniformity of the common law throughout Canada, while undoubtedly at variance with some ideal model of federalism, does not really impair provincial autonomy in any practical way. Moreover, the rule of uniformity makes Canada's laws much less complicated than

> those of the United States, and it allows the highest court (with presumably the best judges) to apply its talents to the development of all Canada's laws, both provincial and federal.

It is worth noting that several issues are conflated in this passage. There is, first, the difficulty of establishing a standard or standards to provide a basis for national uniformity. Second, the rejection of uniformity as a goal does not necessarily lead to or even encourage some undesirable level of complexity. Hogg argues that, apart from Québec, the provinces are not divided by cultural differences—a proposition which the discussions since Meech Lake, the prospect that the Territories (or parts of them) may become provinces and that aboriginal self-government will occur might suggest is no longer valid—so that different laws are unnecessary to express this cultural discrepancy. Differences may well arise, however, not from cultural differences but from political, economic and social differences and these differences may well find expression in significantly different legislation from province to province. The Québec "no-fault" scheme of compensation for automobile accidents—a fruitful source, as we have seen, of "complexity"—does not reflect a cultural difference between Québec and the other Canadian provinces but the fact that the Parti Québecois government of René Lévesque thought that a government run scheme of compensation would be desirable for a number of social, economic and legal reasons. In any event, we always have to be careful of arguments that complexity is a "bad thing". Life is complex and perhaps we should accept the fact that laws that will be responsive to that complexity must also be complex. Simple solutions to complex problems are unlikely to be satisfactory. Finally, there is, we believe, an argument to be made that the provincial courts of appeal should have the primary responsibility for the development of provincial law on the ground that the Supreme Court of Canada is simply too busy to deal with the development of private law as that law should be developed.

If we can accept diversity in interprovincial conflicts, it is very easy to live with it in international conflicts. And even if we cannot accept diversity in an interprovincial case, we cannot do much but tolerate it in international disputes. Such a view merely accepts as inevitable the fact that a Canadian court (of any province) might reach a different result from any American court or a French court. In the international sphere we lack any control over the unreasonable or indefensible application of forum law. We also lack control over the foreign court's taking of jurisdiction, except insofar as antisuit injunctions enable us to interfere with a limited class of (highly) objectionable foreign proceedings. But to admit that we cannot control a foreign court does not require us either to play the ostrich and believe that traditional choice of law rules will avoid the evil we see, or to accept that there are no standards by which any court might choose to be guided. The foreign court may do nothing more dramatic than give its own rules a "moderate and restrained" interpretation and choose not to apply its domestic rules to certain cases of geographically complex facts. Judicial restraint is not to be unexpected, even as we admit that it cannot be compelled. Ultimately, of course, a lack of restraint may lead to such methods of control or influence that the international order offers. We have already seen the consequences of a lack of restraint in such things as the Canadian and British "Claw-back" Acts (Vol. I, p. 432). You may be sure that a large number of diplomatic notes were exchanged over the same issues. We can return to this issue and the broader one of

U.S. Anti-trust policy for a brief exploration of the international problems of choice of law in the world of *realpolitik*.

Conventional wisdom has it that no choice of law is possible in anti-trust cases. International law has been invoked (see, *The Lotus Case, France v. Turkey*, P.C.I.J. Rep. Series A and 10) to justify the extra-territorial effects of a criminal law and to justify the use of forum law in criminal cases (see Severaid, "Commercial Obligations Under the Act of State Doctrine" (1976), 8 *L. & Pol. in Int'l Bus.* 1093 and Jones "Extraterritoriality in U.S. Antitrust: An International 'Hot Potato'" (1977), 11 *Int'l Lawyer* 415). The American standard of free enterprise capitalism may be particularly inappropriate when applied to foreign cartels since United States legislation expressly authorizes American companies to form cartels for export purposes. Although international law has been invoked to justify American judicial behaviour, extra-territoriality in criminal cases is accepted by the international community as part of the general principle that the international community as part of the general principle that consent or general practice give authority to international law (see Statute of the International Court of Justice, Article 38 and Brownlie, *Principles of Public International Law*, p. 3). For this reason, some American academics have been fervent in their efforts to demonstrate that American competition law is internationally accepted (see Metzger, "Cartels, Combines, Commodity Agreements and International Law" (1977), 11 *Texas Int'l L.J.* 506). If internationally accepted general practice is a source of international law analogous to Federal Canadian law, then restraining jurisdiction or application where such general practice is absent is analogous to responsible restraint among provinces. Restraint is particularly desirable in international cartel cases were the activities of the defendants are often approved of by their national governments and where their behaviour is similar to that encouraged for American exporters. Lack of restraint produces a predictable outcry (see Burns, "Antitrust Under the Treaty of Rome" (1977), 11 *Int'l Lawyer* 369 and Handler, "The American Antitrust Experience and its Relationship to the Regulation of Monopolistic Conditions in South Africa" (1976), 9 *Comp. & Int'l L.J. of S.A.* 336). Conflict is an inevitable result of one nation's ignoring the principles of restraint implicit in Article 38 of the *Statute of the I.C.J.* The sources of international law found in Article 38 indicate ways of proving the actions are lawfully authorized. But actions which are not authorized are not necessarily illegal. Thus, while a nation's unrestrained judicial actions may not take their authority from international law, neither may they be illegal.

The previous two paragraphs have assumed that restraint is always a virtue, both in the assertion of jurisdiction and in the application of forum law. This may be the case where antitrust law is concerned, but it is not universally so. For example in the litigation that arose out of the Bhopal gas leak the Indian plaintiffs brought suit against Union Carbide in the United States. In *Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984* (1985), 634 F. Supp. 842 (S.D.N.Y.) a U.S. federal judge agreed with Union Carbide that the United States was only minimally concerned with this legal dispute and that the action should be stayed on grounds of forum *non conveniens*. In considering the jurisdictional issue the court considered the choice of law question (since if U.S. law should apply to the plaintiffs' action that would indicate that an American court was an appropriate forum), and concluded that under an interest analysis approach the U.S. had minimal interest in applying its substantive law to this

action. This represents an attitude of which is in sharp contrast to American practice in the antitrust field. The reasons for this "restraint" are obvious and are well expressed by an Indian legal scholar who labelled the decision "Dow-Jones jurisprudence" (U. Baxi, "Introduction: Towards the Revictimization of the Bhopal Victims" in Indian Law Institute, *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* (Bombay, 1986)). American courts have given a similarly geographically restrained reading to U.S. civil rights law: in *Equal Employment Opportunity Commission v. American Arabian Oil Co.* (1991), 111 S. Ct. 1227 the Supreme Court refused to apply American employment discrimination legislation to American workers allegedly discriminated against by an American company in Saudi Arabia.

Before you conclude that there is no solution except the political one and that we have left the realm of the rule of law altogether, remember that the only point of showing you what can happen in the real world is to disabuse you of the comforting illusion, an illusion as warm and comforting as any rabbit-hole, (See Llewellyn, "On Our Case Law of Contract" (1938), 48 *Yale Law Journal* 1, 32) that any system of rules can do more. We have *not* reached a point were anarchy prevails. All that has happened is really only precisely what you would expect. As the standards for proper or responsible behaviour become looser and more difficult to enforce, there will be more opportunities for conflict and more irresponsible and possibly unfair assertions (or denials) of jurisdiction. But as we go back and forth between the interprovincial and the international spheres, what works in one will basically work in the other. The issues and principles are the same. What, in the end, is surprising is not that there is so little law, but that there is so much.

Chapter 16

Damages in Foreign Currency

We add here an issue which does not fit neatly into the traditional categories of jurisdiction, choice of law or enforcement. It is, however, an issue which often arises in conjunction with conflicts disputes; namely, the question of whether and under what conditions courts may award damages in a currency other than Canadian dollars. Parties to an international sales contract may have agreed that its proper law will be that of Ontario and that only Ontario courts have jurisdiction, yet they may have provided for all payments under the contract to be made in German marks. If an action is brought in Ontario for breach of that contract how is the court to respond to such a provision? Note that a plaintiff will not care greatly whether a court orders payment in marks or dollars, since if it prefers one to the other it can readily effect a conversion. However, if a court does award damages in Canadian currency the parties may care greatly what date the court employed to select on an appropriate exchange rate.

The traditional view was that Anglo-Canadian courts could order monetary awards only in their own currency, and that the appropriate exchange rate from any relevant foreign currency was that prevailing on the date of breach: *Custodian v. Blucher*, [1927] S.C.R. 420, [1927] 3 D.L.R. 40 and *Gatineau Power Co. v. Crown Life Insurance Co.*, [1945] 4 D.L.R. 1. In England the House of Lords affirmed this view in *Re United Railways of Havana and Regla Warehouses Ltd.*, [1961] A.C. 1007. Fifteen years after *Havana Railways*, in the face of pressure from London's international litigation industry, the House of Lords reversed the stance it had taken in that case.

Miliangos v. George Frank (Textiles) Ltd.

[1976] A.C. 443, [1975] 3 All E.R. 801 (H.L.)
(Lords Wilberforce, Keith, Diplock, Salmon and Simon)

[A Swiss resident sold a large quantity of polyester yarn to an English resident for a price expressed in Swiss francs. The proper law of the contract was Swiss law. The English buyer claimed that the goods were defective and refused to pay, so the seller brought an action in debt claiming a sum expressed in Swiss francs. (The Swiss franc had appreciated as against the English pound in the period between when the payment was due and when the litigation took place.) The buyer eventually admitted liability but argued that damages should be calculated in English pounds; i.e., that the contractual amount due should be converted from Swiss francs to English pounds as of the date payment was due (the breach date).

[The trial judge held for the English buyer and applied the breach date rule. The Court of Appeal (Lord Denning M.R., Stephenson and Geoffrey Lane L.JJ.) declined to follow the old rule and allowed the seller's appeal, authorizing judgment expressed in Swiss francs. The buyer appealed to the House of Lords. Much of their Lordships' reasons were taken up with discussions of when it was proper for that court to depart from one of its own previous decisions. We

that practitioners, with the assistance of the Supreme Court, can work out suitable solutions. . . . I would accordingly depart from the *Havana Railways* case and dismiss this appeal.

[LORDS KEITH, DIPLOCK and SALMON agreed with LORD WILBERFORCE. LORD SIMON dissented, partly because he thought the House of Lords should be slow to depart from its previous decisions and partly on the point of principle expressed in the following extract:]

Is it proposed to deny to the foreign creditor the right to sue in England for the sterling equivalent of the foreign money obligation? How can that be done without legislation? But, unless it is done, the foreign creditor will have the benefit of movements of exchange rates either way: if sterling is appreciating, he will sue in sterling; if it is depreciating he will sue in the foreign money. This strikes me as highly unjust to the English debtor, as well as importing an undesirable element of monetary speculation in English litigation.

NOTES AND QUESTIONS

1. Lord Wilberforce left open the question whether damages could be awarded in foreign currency in actions other than those brought in debt. Since *Miliangos*, awards in foreign currency have been authorized for contract damages (*Jean Kraut A.G. v. Albany Fabrics Ltd.* (Q.B.D.)), tort damages (*The "Despina R" and The "Folias"*, [1979] A.C. 685, [1979] 1 All E.R. 421 (H.L.)) and money due in an action for unjust enrichment (*B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2)*, [1979] 1 W.L.R. 783, aff'd, [1981] 1 W.L.R. 232 (C.A.).

2. In part of his speech which has been eliminated by our editing, Lord Wilberforce gave a number of reasons for concluding that it was appropriate to authorize judgment in Swiss francs in this case: the creditor was Swiss (*i.e.*, it was his home currency), Swiss law was the proper law of the contract and the contract provided for payment in Swiss francs. It does not take much imagination to appreciate that cases will arise where these factors do not all point to the same country. In what currency should damages then be awarded when these factors do not all point to the same country?

3. What should the proper law of the contract have to do with the currency in which a judgment is expressed? If the parties to a commercial agreement expressly stipulate that a certain country's law is to be the proper law of that contract, why should that have any effect on the currency in which damages should be expressed? Should the result in *Miliangos* have been different if the contract was governed by English law? If the contract was in fact governed by Swiss law, should the House of Lords not have consulted Swiss law as to the currency of judgment?

4. Lord Simon's dissent points to the danger which will follow if the *Miliangos* rule is treated as giving plaintiffs a choice of the currency of judgment. He can see no way of eliminating this choice apart from legislation. Lord Denning did not find it necessary to wait for Parliament to act. In following *Miliangos* in *The "Maratha Envoy"*, [1977] 1 Lloyd's Rep. 217 (C.A.) he wrote (at 225):

> Once it is recognized that judgment *can* be given in a foreign currency, justice requires that it *should* be given in a foreign currency in every case where the currency of the contract is a foreign currency: otherwise, one side or the other will suffer unfairly by the fluctuations of the exchange.

Was Lord Denning correct in holding that the *Miliangos* approach should be a mandatory rather than a permissive one? Note that Lord Denning's judgment in *The "Maratha Envoy"* also provides some answers to the question of which factor(s) should persuade a court to grant judgment in a foreign currency: he focuses on 'the currency of the contract' and makes no mention of other factors, such as the residence of the parties or the proper law of the contract. Where does this leave us in torts cases?

5. The following provisions of the *Uniform Foreign-Money Claims Act* drafted by the National Conference of Commissioners on Uniform State Laws and approved and recommended for enactment in all states in 1989 give an American answer to some of the above questions:

> **4(a)** The money in which the parties to a transaction have agreed that payment is to be made is the proper money of the claim for payment.
>
> **(b)** If the parties to a transaction have not otherwise agreed, the proper money of the claim, as in each case may be appropriate, is the money:
>
> > **(1)** regularly used between the parties as a matter of usage or course of dealing;
> >
> > **(2)** used at the time of a transaction in international trade, by trade usage or common practice, for valuing or settling transactions in the particular commodity or service involved; or
> >
> > **(3)** in which the loss was ultimately felt or will be incurred by the party claimant.
>
> **6(a)** A person may assert a claim in a specified foreign money. If a foreign-money claim is not asserted, the claimant may claim in United States dollars.
>
> **(b)** An opposing party may allege and prove that a claim, in whole or in part, is in a different money than that asserted by the claimant.

> second judgment rule would at least produce the same result as the date of effective payment rule if the judgment is paid at once.

If I could be satisfied that there are no procedural or practical problems and that the *Currency and Exchange Act* either did not apply to judgments or did not prevent a judgment being given for a sum of a foreign currency and its equivalent in Canadian dollars, as the English Courts are now doing, I would adopt the effective date of payment as being the date for determining the rate of exchange. Because I am not certain that the are no problems and because I assume that the *Currency and Exchange Act* does not permit judgments to be given as they are now being given in England, I will use the rate of exchange as prevailing at the date of the second judgment herein, the date of my judgment, December 21, 1977, in determining the amount which the defendant here owes to the plaintiff. As I have said above if the parties cannot agree upon what rate of exchange was on December 21, 1977, I will accept on behalf of the plaintiff a statement of any chartered bank of Canada signed by an officer or manager thereof which sets out the rate of exchange on that date.

There will, therefore, be judgement before the plaintiff in the amount of that number of Canadian dollars which as of December 21, 1977, will be the equivalent of $16,940.63 United States dollars together with interest at the rate of 5% per annum calculated on that amount form August 26, 1970 to December 21, 1977, inclusive. The plaintiff is to have its costs of this action forthwith after taxation thereof.

NOTES AND QUESTIONS

1. The judgment of Carruthers J. was affirmed by the Ontario Court of Appeal at 26 O.R. (2d) 249 and 800n. In *Bedford v. Shaw* (1981), 33 O.R. (2d) 766 (S.C., Master), it was held that the judgment day conversion rule was a mandatory one.

2. Carruthers J. distinguishes the Supreme Court of Canada cases on currency of judgment by noting that they did not deal with foreign judgments. Why should that make a difference? Where does that leave Canadian courts when a request is made for judgment in foreign currency in an action brought for breach of contract or for tort? Some courts have answered that question by holding that they are bound by the old Supreme Court cases which require a breach-date conversion to Canadian dollars: *N.V. Bocimar S.A. v. Century Insurance Co. of Canada* (1984), 7 C.C.L.I. 165 (F.C.A.); *First National Bank of Oregon v. A.H. Watson Ranching Ltd.* (1984), 34 Alta. L.R. (2d) 110 (Q.B.); and *Am-Pac Forest Products Inc. v. Phoenix Doors Ltd.* (1979), 14 B.C.L.R. 63 (S.C.). Others have been prepared to follow *Miliangos: Re Canadian Vinyl Industries Inc.* (1978), 29 C.B.R. 12 (Que. S.C.) and *Sandy Frank Film Syndication Inc. v. CFQC Broadcasting Ltd.*, [1983] 4 W.W.R. 360 (Sask. C.A.). In *Prasad v. Frandsen*, (1985), 60 B.C.L.R. 343 (S.C.) Mackoff J.

applied a judgment date conversion in a personal injury case, distinguishing the Supreme Court of Canada authorities on the grounds that they were "commercial cases". The Supreme Court of Canada had an opportunity to address the issue in *Williams & Glyn's Bank Ltd. v. Belkin Packaging Ltd.*, [1981] 1 S.C.R. 661 but decided that it was not necessary to decide the matter at that time.

3. Carruthers J. felt constrained by a federal statute which apparently requires all judgments of Canadian courts to be expressed in Canadian dollars. The provision he quoted now appears as s. 12 of the *Currency Act*, R.S.C. 1985, c. C-52. The extract from *Canadian Conflict of Laws* (*supra*, p. 200) which Carruthers J. quotes indicates that Castel believes this statute limits judges who wish to depart from the breach date rule to a judgment date conversion (rather than the collection date conversion provided for in *Miliangos*).

4. Ontario finessed the federal statute by the following provision of the *Courts of Justice Act*, R.S.O. 1990, c. C.43:

> **121(1)** . . . where a person obtains an order to enforce an obligation in a foreign currency, the order shall require payment of an amount in Canadian currency sufficient to purchase the amount of the obligation in the foreign currency at a chartered bank in Ontario listed in Schedule I to the *Bank Act* (Canada) at the close of business on the first day on which the bank quotes a Canadian dollar rate for purchase of the foreign currency before the day payment of the obligation is received by the creditor.

British Columbia enacted a similar provision: *Foreign Money Claims Act*, S.B.C. 1990, c. 18. Is there any reason why courts in provinces which lack statutory provisions like these could not reach the same result by phrasing their judgments in the terms suggested by the Ontario act?

5. Section 121 of the *Courts of Justice Act* demonstrates that the real concern in this area is not the currency in which the creditor is finally paid but the date at which the conversion is made. The question of currency of payment is inseparable from the question of the date at which damages are to be assessed (i.e., the date as of which the market is to be consulted in order to arrive at some substitutionary equivalent of the plaintiff's loss). That question is again closely bound up with the issue of mitigation, allocation of the risk of exchange rate fluctations—exactly parallel to the issues raised by a claim for specific performance. Do those issues provide any guidance as to when a damages award should be expressed in a foreign currency? Is it satisfactory to say, e.g., that the "normal" rule will be departed from when "damages are inadequate"?

6. In *Miliangos*, Lord Wilberforce is of the opinion that mitigation is particularly difficult when the obligation that is breached is one to deliver a foreign currency. He writes that while "in the case of the inevitable contract to

supply a foreign cow, the intending purchaser has to be treated as going into the market to buy one as at the date of breach, this doctrine cannot be applied to a foreign money obligation, for the intending creditor has nothing to buy his own currency with—except his own currency." Does this argument hold water? Does Lord Wilberforce assume that the disappointed creditor could not take out a loan? Are issues of impecuniosity—generally rigorously rejected under *Hadley v. Baxendale*—relevant when the claim involves foreign currency but generally excluded everywhere else in the law?